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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 279.

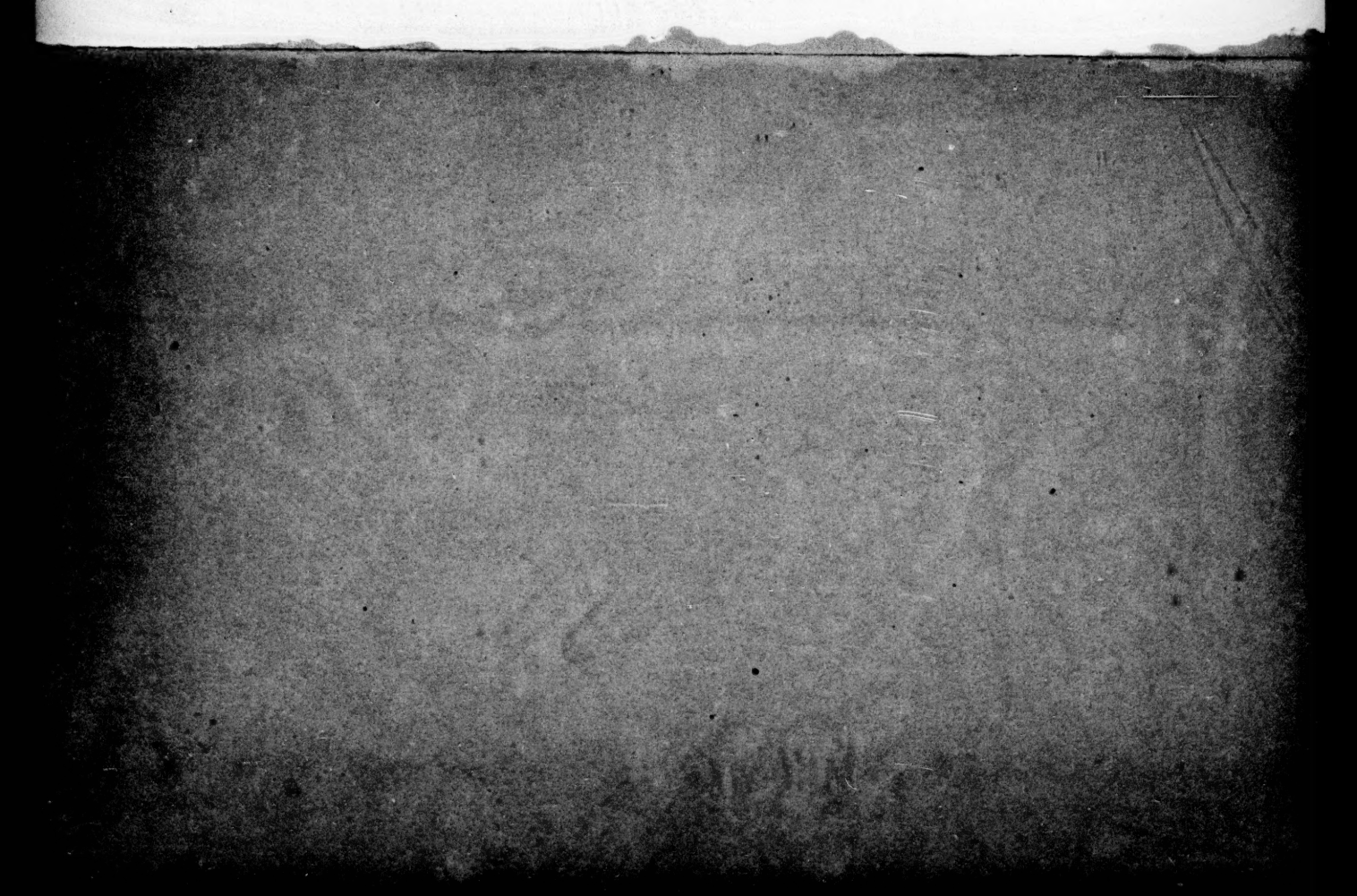
FRANCES BEATTY, THOMAS ALEXANDER BEATTY, AND THOMAS ALEXANDER BEATTY, GUARDIAN AD LITEM OF SARAH ALEXINA BEATTY, JAMES RICHARD DAVIS, WILLIAM HENRY DAVIS, ADDIE VIOLA DAVIS, AND —— DAVIS, MINORS, PLAINTIFFS IN ERROR,

vs.

GEORGIA BENTON, EXECUTRIX OF FANNY GARDNER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

FILED DECEMBER 27, 1886.



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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said honorable supreme court of the State of Georgia, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Frances Beatty, Thomas Alexander Beatty, and Thomas Alexander Beatty, guardian *ad litem* of Sarah Alexina Beatty; James Richard Davis, William Henry Davis, Addie Viola Davis, and —— Davis, minors, plaintiffs in error, and Georgia Benton, executrix of Fanny Gardner, defendant in error, wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution

2 or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Frances Beatty, Thomas Alexander Beatty, and Thomas Alexander Beatty, guardian *ad litem* of Sarah Alexina Beatty; James Richard Davis, William Henry Davis, Addie Viola Davis, and —— Davis, minors, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the third day of November, in the year of our Lord one thousand eight hundred and eighty-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
W. B. WOODS,
Associate Justice Supreme Court U. S.

3 [Endorsed:] (Original.) Filed in office Dec. 4, '86. Z. D. Harrison, cl'k S. C., Ga.
1—279

4 The United States of America to Georgia Benton, executrix of Fanny Gardner, late of the city of Augusta, in the county of Richmond, in the State of Georgia, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the honorable the supreme court of the State of Georgia, wherein Frances Beatty, Thomas Alexander Beatty, and Thomas Alexander Beatty, guardian *ad litem* of Sarah Alexina Beatty; James Richard Davis, William Henry Davis, Addie Viola Davis, and —— Davis, minors, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Woods, associate justice of the Supreme Court of the United States, this third day of November, in the year of our Lord one thousand eight hundred and eighty-six.

W. B. WOODS,
Associate Justice Supreme Court U. S.

5 On this thirteenth day of December, in the year of our Lord one thousand eight hundred and eighty-six, personally appeared W. Daniel, sheriff of Richmond Co., Ga., before me, the subscriber, Samuel Levy, circuit court commissioner of the United States for the southern district of Georgia, and makes oath that he delivered a true copy of the within citation to Georgia Benton, executrix of Fanny Gardner, late of said county, deceased, on December eleventh, eighteen hundred and eighty-six.

W. DANIEL,
Sheriff R. C., Ga.

Sworn to and subscribed the thirteenth day of December, A. D. 1886.

{ Seal Samuel Levy, U. S. Circuit Court Commissioner, So. Dist. of Georgia. }

SAMUEL LEVY,
United States Circuit Court Commissioner for the Southern District of Georgia.

[Endorsed:] (Original.) Filed in office Dec. 16, 1886. Z. D. Harrison, cl'k S. C., Ga.

6 UNITED STATES OF AMERICA, *ss:*

Know all men by these presents that we, Frances Davis, formerly Frances Beatty, and Thomas Alexander Beatty, for himself and as guardian *ad litem* in the cause hereinafter stated of Sarah Alexina Beatty, James Richard Davis, William Henry Davis, Addie Viola Davis, and —— Davis, minors, as principals, and Robert L. Pierce and Edward Geddings, sureties, all of the city of Augusta, in the

county of Richmond and State of Georgia, are held and firmly bound unto Georgia Benton, executrix of Fanny Gardner, late of said county of Richmond, in the full and just sum of five hundred dollars, to be paid to the said Georgia Benton, executrix as aforesaid, her certain attorney, assigns, or successor or successors in said executorship; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of October, in the year of our Lord eighteen hundred and eighty-six.

Whereas lately, at a session of the honorable the supreme
7 court of the State of Georgia, in a suit depending in said court between the said Frances Beatty, Thomas Alexander Beatty, and Thomas Alexander Beatty as guardian *ad litem* of Sarah Alexina Beatty; James Richard Davis, William Henry Davis, Addie Viola Davis, and —— Davis, minors, plaintiffs in error, and Georgia Benton, executrix of Fanny Gardner, defendant in error, judgment was rendered against the said Frances Beatty, Thomas Alexander Beatty, and Thomas Alexander Beatty, guardian *ad litem* of Sarah Alexina Beatty; James Richard Davis, William Henry Davis, Addie Viola Davis, and —— Davis, minors, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Georgia Benton, executrix of Fanny Gardner, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Frances Beatty, Thomas Alexander Beatty, and Thomas Alexander Beatty, guardian *ad litem* of Sarah Alexina Beatty; James Richard Davis, Addie Viola Davis, and —— Davis, minors, shall prosecute said writ of error to effect and answer all damages
8 and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THOMAS A. BATEY. [L. S.]
THOMAS A. BATEY, [L. S.]
Guardian.
her
FRANCES x DAVIS.
mark.
EDW. GEDDINGS. [L. S.]
ROB'T L. PIERCE. [L. S.]

Test: WM. E. KEENER.

Signed, sealed, and delivered in my presence.
[SEAL.] WM. E. KEENER,
Clerk Superior Court, Richmond County, Georgia.

Approved.
W. B. WOODS,
Associate Justice Supreme Court U. S.

9 [Endorsed:] Filed in office Dec. 4, 1886. Z. D. Harrison, cl'k S. C. Ga.

10 Richmond Sup. C't. Apr. T., 1879. Equity.

FANNY GARDNER
vs.
FRANCES BEATTY.

STATE OF GEORGIA,
Richmond County.

To the Honorable Claiborne Snead, judge of the superior court of said county, exercising jurisdiction in equity:

Your oratrix, Fanny Gardner, humbly complaining, showeth unto your honor that on the third day of May, in the year of our Lord one thousand eight hundred and fifty-four, Thomas Gardner, her husband and the father by a former wife of Frances Beatty, then Gardner, the defendant in this bill, all being free persons of color, for and in consideration of the sum of six hundred dollars ($600), purchased from one John Carrie, of the city of Augusta, State and county aforesaid, the following-described property, to wit: All that lot or parcel of land situate, lying, and being in the said city of Augusta, county and State aforesaid, on the south side of Miller street, bounded on the north by said street, on the east by Campbell street, on the south by lot now or formerly owned by the said
11 John Carrie, and on — west by an alley, said lot or parcel of land having a front on Campbell street eighty-two feet six inches, more or less, and running back to said alley two hundred feet, more or less; that the said property was purchased for the use and benefit of the said Thomas and Fanny and Frances, and that the deed, at the special instance and request of the said Thomas, was made to Elijah O. Robertson in trust for the use, benefit, and behoof of the said Fanny & Frances, as provided by the terms of the said deed, a copy of which is hereto annexed, marked Exhibit "A," and to which copy your oratrix prays reference may be made as often as may be necessary.

Your oratrix further shows that the said Elijah Robertson never accepted the said trust, nor was any trustee ever appointed in his place; nor was the said property ever managed or controlled by any trustee, but that on the said third day of May, 1854, the said Thomas Gardner, with her and the said Frances, took possession of the said property; that in the month of ——, in the year ——, before the late war, the said Frances having married, the said lot was divided by the said Thomas and a house erected on the portion for the said Frances; that thus the said parties continued in the peaceable
12 and uninterrupted possession and enjoyment of the said property until the year 1867, at which time the said Thomas Gardner died intestate; that from the death of the said Thomas until the present time the said Frances has remained in the possession of the portion of the lot upon which, as already mentioned,

the house was erected for her use and occupation, and your oratrix has occupied the remaining part of the said lot and controlled and rented the same.

Your oratrix further shows that the deed aforesaid to the said Elijah Robertson was null and void, because at that time all conveyances of real estate in the city of Augusta to or for the use of free persons of color residing in said city were expressly prohibited by law, but that your oratrix acquired title to the property now occupied by her through actual adverse possession of the same for twenty years, and that the said Frances Beatty in the same way has acquired title to the premises occupied by her.

Your oratrix further shows that being old and unable to earn a livelihood, as in former years, by her labor, and having no means of support except the said premises (acquired as aforesaid by operation of law), which do not yield a sufficiency in rents for that
13 purpose, she is desirous of selling the same and using or reinvesting the money in such property as will yield an income more adequate to her necessities; that she has been offered for the property a large sum of money, to wit, — dollars, but that the would-be purchaser declines to buy because the said Frances Beatty, combining and confederating with other persons at present unknown to your oratrix, whose names when discovered she prays she may be at liberty to insert herein, with apt words to charge them as parties defendants hereto, and contriving to wrong and injure —. Your oratrix claims that under the terms of the said trust deed she owns a remainder interest in the whole of said property, and that your oratrix has only a life estate therein, and also that the said premises cannot be sold except with the consent of her, the said Frances; that the said place is valuable, and would command a ready sale and a fair price if it were not for the claim thus falsely and fraudulently set up by the said defendant; that thus the said defendant has slandered and is slandering the title of your oratrix to said property, and by claiming under the aforesaid trust deed casting
14 a cloud upon the said title, which your orator seeks through this her bill of complaint to remove.

And your oratrix further shows that all these acts and doings of the said Frances Beatty and her unknown confederates are contrary to equity and good conscience and tend to the manifest injury of your oratrix in the premises; and in consideration whereof, and forasmuch as your oratrix can only have adequate relief in the premises in a court of equity where matters of this nature are properly cognizable and relievable, she prays—

First. That this court will decree that she owns a fee-simple title to the lot, with the improvements thereon, now occupied by her, situate on the south side of Miller street, in the city of Augusta, State and county aforesaid, bounded as follows: On the east by Campbell street; on the west by lot occupied by said Frances Beatty; on — north by Miller street; and that the said trust deed be cancelled.

Secondly. That if this honorable court should hold that the title of your oratrix and the defendant is derived from seven years' pos-

session under the said trust deed as color of title it will de-
15 cree that the terms of said trust deed do not bind your oratrix or limit her title in said property.

Thirdly. That if your oratrix have not a fee-simple title to the portion of the place above described and now in her possession she and the defendant may be decreed to be tenants in common of the entire property and the same may be divided by commissioners appointed by your honor or sold and the proceeds divided, share and share alike, between the parties to this bill.

Fourthly. That your oratrix may have such further or other relief in the premises as the nature of the case may require and to your honor shall seem meet; and your oratrix, expressly waiving discovery, prays that it may please your honor to grant unto her the State's writ of subpœna, to be directed to the said Frances Beatty, thereby commanding her, at a certain day and under certain penalty therein to be named, personally to be and appear before your honor in this honorable court, and then and there to answer all and singular the premises, to stand to, perform, and abide such order and decree therein as to your honor shall seem meet and is agreeable to equity; and your oratrix will ever pray, etc.

DAVENPORT JACKSON,
Compl't's Counsel.

16 STATE OF GEORGIA, }
Richmond County. }

Personally appeared before me Fanny Gardner, who, being duly sworn, deposes and says that what is contained in the above — foregoing bill, so far as it concerns her own act and deed, is true, and so far as the facts have been derived from the information of others she believes them to be true.

her
FANNY x GARDNER.
mark.

Sworn & subscribed before me this 15th day of March, 1879.
M. P. CARROLL,
Notary Public, Rich. Co., Ga.

STATE OF GEORGIA, }
Richmond County. }

This indenture, made this third day of May, in the year of our Lord one thousand eight hundred and fifty-four, between John Carrie, of the city of Augusta, county and State aforesaid, of the one part, and Elijah D. Robertson, of the same place, of the other part, witnesseth:

That the said John Carrie, for and in consideration of the sum of six hundred dollars to him in hand well and truly paid by the said Elijah Robertson at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted,
17 bargained, sold, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, *relieve*, convey, and confirm, unto the said Elijah D. Robertson, his heirs and assigns,

all that lot or parcel of land situate, lying, and being on the south side of Miller street, city of Augusta, county and State aforesaid, bounded on the north by said street, on the east by Campbell street, on the south by lot owned by said John Carrie, and on the west by an alley, said lot or parcel of land having a front on Campbell street of eighty-two feet six inches, more or less, and running back to said alley two hundred feet, more or less; in trust, nevertheless, to and for the sole use, benefit, and behoof of the following persons of free color of said city, county, and State, to wit, Fanny Gardner, the wife of Thomas Gardner, and their daughter, Frances Gardner, and any future issue of the said Fanny by the said Thomas, and, in case of the death of the said Frances and Fanny, in trust for the next of kin of the said Thomas Gardner; and the said Elijah D. Robertson is hereby authorized and empowered, in case it should be deemed advisable and to the interest of all concerned that a sale of said property should take place, to sell and make titles to the same,
18 provided that the consent of the said Frances and Fanny, their guardian or guardians, if any, *being* first had and obtained, together with all and singular the rights, members, and appurtenances thereof whatever to the said lot or parcel of land being, belonging, or in anywise appertaining and the remainders, reversions, rents, issues, and profits thereof and every part thereof; to have and to hold the said lot or parcel of land and all and singular the premises and appurtenances thereunto belonging as aforesaid and every part thereof unto the said Elijah D. Robertson, his heirs and assigns forever; and the said John Carrie and his heirs and all and every other person and persons whomsoever shall and will warrant and forever defend these presents, subject to the rights and trusts hereinbefore set forth.

In witness whereof the said John Carrie hereunto set his hand and seal the day and year above written.

JOHN CARRIE.

"Recorded in Book II, folios 327 & 328, May 8, 1854.
JOHN PHINIZY,
Dep'ty Clerk."

Sealed & delivered in presence of—
R. D. GLOVER.
WM. R. McLAWS, *N. P., R. C.*

19 STATE OF GEORGIA, }
Richmond County. }

To the sheriff of said county, Greeting:

For certain causes to us made known by the bill of complaint of Fanny Gardner, filed in the clerk's office of the superior court of said county, on the chancery side of said court, in which said Fanny Gardner is complainant and you, the said Frances Beatty, is defendant, we command and strictly enjoin you that, laying all business aside and notwithstanding any excuse you may have, that you be and appear before us at our superior court, to be held in and for

said county on the third Monday in April, 1879, next, to answer to all such matters and things as may then and there be objected against you, and to stand to and abide the further order and decree then and there to be made in the premises.

Witness the Honorable Claiborne Snead, judge of said court, this 15th day of March, 1879.

S. H. CRUMP, *Clerk.*

Personally served Frances Beatty with a copy of the within this 24th day of March, 1879.

CHARLES H. SIBLEY,
Sheriff R. C.

The within bill was taken from the clerk's office March 21st,
20 1879, and the name of the defendant changed from "Frances Bailey" to "Frances Beatty," as it now appears.

DAVENPORT JACKSON,
Att'y for Complainant.

This bill returned and filed in office March 22nd, 1879.

WM. E. KEENER, *D. C.*

And complainant further shows that one-half of the purchase-money of said property was by her furnished to the said Thomas Gardner at the time of the purchase, said money being the proceeds of her labor as a free person of color.

By leave of the court first had and obtained complainant amends her bill and says that if this honorable court should hold that in the division of said lot by the said Thomas Gardner, in which he gave to your oratrix the portion on which she has since lived, that she acquired no legal interest therein and no interest that has or could ripen by prescription, then and in that event she says that the said Thomas Gardner, if his gift to your oratrix was to be counted as no gift, that he died in possession of all of said lot, leaving as his only heirs your oratrix and respondent, Frances Beatty; that the said heirs have by tacit consent actually occupied, held, and
21 claimed the *the* shares or portions so as aforesaid divided to them by said Gardner from the time of his death until the present; that said Gardner made no will and left no other heirs.

GEORGIA,
Richmond County.

In the Superior Court of said County.

Mary Frances Davis, formerly Mary Frances Beatty, born Mary Frances Gardner, respondent, for answer unto the bill in equity exhibited in said court against her under the name of Frances Beatty by Fanny Gardner, compl't, saith that respondent admits the truth of the allegations of said bill as to the relationship of Thos. Gardner to respondent and to complainant, and that said Thomas purchased the property in said bill mentioned and took from the said John

Carrie the trust deed set out in exhibit to said bill, and that respondent, complainant, and said Thomas resided continuously on said property from the time of said purchase until the death of said Thomas in Nov., 1865, and that compl't and respondent have continued such residence from that time up to the present. Respondent denies that said property was ever divided between her and complainant by said Thomas or
22 since his death otherwise than that the said Thomas, for convenience and that only, respondent being married and having many children, and the house of the said Thomas being insufficient to accommodate said Thomas and compl't and respondent and her husband and numerous family, built another house for respondent on said property, and respondent says that, the same reasons of convenience continuing, respondent and complainant have continued from the death of said Thomas to reside in said houses respectively.

And respondent, further answering, denies all the allegations of said bill touching the nature of the title whereby respondent and compl't enjoy the use of said property, and says that their title is an equitable one as *co-cestui que trust.* for life, with remainder over to respondent's children living at the termination of said equitable life estate.

And, further answering in the nature of a cross-bill, respondent showeth unto the court here that prior to January 1st, 1863, no proceedings were ever instituted to escheat said property as being conveyed for the benefit of free persons of color, and by section
23 2627 of the Code of Georgia, as becoming of force on the first day of January, 1863, this State declared that escheat should lie only on failure of heirs, and that by the act of March 17, 1866, free persons of color were vested with all the property rights of white persons; that among these rights was the one to a prescriptive title by adverse possession for seven years under written evidence of title and by possession adverse to all the world under said trust deed for seven years and more pryor to the bringing of compl't's bill complainant and respondent had a good prescriptive title to said property under and according to the limitations of said deed, and that respondent and complainant have an equitable life estate in common in said property, with remainder in fee on their death to the next of kin of said Thomas.

And respondent further showeth that she has now living six children, to wit, a son, Thomas Alexander Beatty, an adult, and Sarah Alexina Beatty, a daughter, aged thirteen, by her first husband, Aleck Beatty, and a son, James Richard Davis, aged eight; a son, William Henry Davis, aged five; a daughter, Addie Viola Davis, aged three years, and an infant babe by her present husband, John A. Davis, and that these children are the next of kin after respondent to said Thomas Gardner, their grandfather,
24 the marriage of the said Thomas with complainant being void of issue. Respondent prays the court that her said adult son be made a party respondent in this cause, and that the

court do appoint a guardian *ad litem* for said minor children, and that said guardian be also made a party respondent.

Respondent further shows that the said Thomas in his life ever meant and constantly declared that the said property purchased by him was to be for the joint use during life of complainant and respondent, with remainder to his next of kin, and at no time did the said Thomas ever mean or contemplate any other disposition of said property, and to effectuate said purpose and intent said Thomas had said trust deed drawn. Respondent further shows that by the lack of a trustee to carry out the trust in said deed declared there is danger that the beneficial intent of said Thomas may not be carried into effect, and, that said trust may in all its parts be effectuated and this danger obviated, respondent prays that this court may order and decree said trust a valid and subsisting trust and appoint a trustee to carry out the terms and uses thereof—that is to say, to hold said property in trust for the joint use and benefit of
25 respondent and complainant during their lives or either of them, and in trust, further, at the termination of said lives, to convey said property under the direction of this court to the next of kin of the said Thomas then living—that is to say, to such of respondent's children as may be then living; and should there be none such, then to the next kin to them, to the said Thomas; and respondent prays such other relief as may to equity seem meet.

SALEM DUTCHER,
Respondent's Solicitor.

Filed in office April 21, 1880.

S. H. CRUMP, *Clerk.*

On motion of respondent, compl't acceding to its correctness, ordered that within answer and cross-bill be, and are hereby, established as true copy of lost originals.

This June 27, 1884.

E. H. POTTLE,
Judge Sup. Court N. C., Presiding.

26 FANNY GARDNER
vs.
FRANCES BEATTY.

Respondents, amending, by leave of the court had, their answer and cross-bill in above-stated cause, say: Respondents, further answering, say that continuously from date of said trust deed up to Nov. 23d, 1865, comp'l't, respondent Beatty, and said Thos. Gardner, all being free persons of color, resided together on said lot, and that they entered upon and were in such occupancy under and by virtue of said deed only; that said Tom died on Nov. 23, 1865; that from the time of his death to the institution of this suit complainant and said respondent continued in the occupancy of said lot; that more than seven years elapsed from the death of said Tom to the institution of this suit; that under the laws of the State of Georgia, as the same existed from the date of said trust deed up to the present time,

a deed or any other instrument in writing purporting to convey titles to land, even if void and legally incapable in itself of conveying the title purported thereby to be conveyed, is good as color of title, and adverse possession of such land thereunder for seven
27 years gives a good title, such as set out in the deed, by prescription to such land; that by and under the first section of the act of the Congress of the United States of April 9, 1866, embodied in sections 1979, 1878 of the revised Statutes of the United States of America all persons within the jurisdiction of the United States became, were, and are entitled to the equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and all citizens of the United States became, were, and are entitled in every State to the same rights as are enjoyed by the white citizens thereof as respects real and personal property; that by and under the first section of the fourteenth article of amendment to the Constitution of the United States it is provided that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; that under and by virtue of said act of Congress and said amendment as aforesaid respondents became, were, and are entitled to the same rights as to prescriptive title by possession under color of title as aforesaid as any white person; that under and by
28 virtue of said act and said amendment the act of the General Assembly of the State of Georgia entitled "An act supplementary to and more effectually to enforce an act entitled 'An act prescribing the mode of manumitting slaves in this State,' approved Dec. 19, 1818," and the act of said General Assembly amendatory of said act of 1818 and entitled "An act to amend the act of 1818," approved Dec. 22, 1819, cannot be lawfully enforced as against respondents' rights under said trust deed as color of title as aforesaid, even if said deed were originally void, which respondents do not admit; that respondents, specially relying on said act of Congress and said XIV amendment, claim that under said trust deed and their said occupancy of said lot thereunder for seven years after Nov. 23, 1865, compl't & respondent have an equitable life estate in common in said lot, remainder in fee to next of kin to said Thomas.

SALEM DUTCHER,
THOS. S. BEAN,
Resp'ts' Sol'rs.

Amendatory Answer and Cross-Bill. Filed in Office June 26th, 1884.
Wm. E. Keener, Clerk.

29 GARDNER } *vs.* BEATTY. }

And now comes the respondent, and, by leave of the court first had,

amends her answer, and says that complainant, as to her claim set up in her bill as amended on June 28th, 1884, charging that one-half of the purchase-money of said property was by her furnished to the said Thos. Gardner at the time of the purchase, said money being proceeds of her labor as a free person of color, is barred from setting up title by the statute of limitations, said claim being for the first time asserted by complainant on said June 28th, 1884, more than thirty years after the purchase of said property by the said Thomas Gardner, and compl't by her own lasches is estopped from now asserting said claim.

June 29th, 1884.

SALEM DUTCHER,
THOS. BEAN,
Resp'ts' Sol'rs.

FANNY GARDNER
vs.
FRANCES BEATTY. } Equity.

Counsel consenting, ordered, that respondent have leave to answer said cause on or before Thursday, April 22, 1880, but not later.

CLAIBORNE SNEAD, *J. S. C.*

30

FANNY GARDNER
vs.
FRANCES BEATTY. } Equity.

Counsel consenting, ordered, as prayed by respondent in her cross-bill, that a guardian *ad litem* be appointed for the minors in said cross-bill mentioned, said guardian to be hereafter named, and that said guardian *ad litem* and the Thomas Alexander Beatty in said cross-bill mentioned be made parties respondent, and the cause proceed.

This April 29th, 1880.

E. H. POTTLE,
Judge Sup'r Court, N. C.

Respondents' Requests.

GARDNER
vs.
BEATTY *et al.* }

Respondents request the court to charge—

1. The case made by the pleadings in this case is, in brief, as follows: The complainant, Fanny Gardner, prays that that portion of the lot on which she now resides be decreed to be hers absolutely. She says this should be done for two reasons—

1st. Because she has a good prescriptive title in fee simple to that portion by twenty years' possession thereof.

2dly. Because she contributed one-half of the purchase-

31 money of the whole lot; and,

3dly. That she has a good title as heir to Thos. Gardner.

She says she wants to sell that portion of the lot to which she lays claim, but that respondents have prevented her from finding a purchaser by setting up that she has only a life estate in common with the resp't, Frances Beatty, in the whole lot under the trust deed of 1854. She says this deed is void because it conveys realty in Augusta, Ga., in trust for the benefit of free persons of color, contrary to the laws of Georgia.

The respondents deny that compl't has a fee-simple title to any part of the lot. They say that even if the deed of 1854 was void when made complainant and respondent went into the occupancy of the lot under it; that they were in the occupancy of the lot under that deed on the 17th of March, 1866, when the laws of Georgia gave colored people the same property rights as white people; that they were in the occupancy of the lot under that deed on the 9th of April, 1866, when an act of Congress gave colored persons the same property rights in every State as white persons; that they remained continuously in possession of the lot under that deed as color of title for seven years after the 17th of March, 1866, and the 9th of April, 1866; that under the laws of Georgia
32 as of force from long prior to 1866 up to the present day possession of realty under color of title for seven years gives those so holding a good prescriptive title, such as set out in the color of title, to that property, and that even a void deed, which in and of itself conveys no title, is good as color of title on which to base such a prescription; that by holding under the deed of 1854 for seven years after March 17th, 1866, a good prescriptive title vested both in compl't and resp't, Frances Beatty, according to the terms of that deed; that this title is an equitable — for life in compl't & Frances, as tenants in common, remainder over in fee to Thomas Gardner's next of kin. Respondents deny that complainant had any other title to the lot or any part thereof than the one just mentioned. Respondents, relying specially on the act of Congress of 9th of April, 1866, heretofore mentioned, and on so much of the XIV amendment to the Constitution of the United States as declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws, say that the
33 acts of Georgia of 1818 and 1819 prohibiting free persons of color from having any legal or equitable title or interest in realty in the city of Augusta, in said State, cannot now be lawfully enforced against respondents so as to deny them in this proceeding the full and equal benefit, since March 17th, 1866, and 9th of April, 1866, of the laws of Georgia as to prescriptive title to realty by seven years' possession under written evidence or color of title the same as if they were white persons. The issue is therefore as to the nature of complainant's title as respects this land.

2. If you find from the evidence in this case that Thomas Gardner bought this land for the joint use of Fanny & Frances during their lives and at their death to go to his next of kin and had the

deed of 1854 made to carry out this purpose, and that Frances and Fanny entered on the occupancy of the land by virtue of the deed and were in the occupancy of the land under the deed at the time free persons of color became entitled to equal property rights under the law with white persons and remained in such possession and occupancy for seven years thereafter, then I charge you that, even if that deed itself were void, they obtained a good prescriptive
34 title, such as set out in the deed—that is, a good prescriptive title to the joint use and enjoyment of the land during their lives. The fact that the deed was void or that Fanny & Frances were free people of color in nowise prevents such a prescriptive title as stated accruing to them, if the evidence shows the facts above stated.

3. Whenever two persons are from any cause entitled to the possession simultaneously of any property in this State they are tenants in common and each entitled to the use and enjoyment of one-half of the common property, and are each liable for one-half of the burdens imposed by law on the common property, such as taxes. If, therefore, you find from the evidence in this case that Fanny & Frances became simultaneously entitled to the possession of this property they were tenants in common, equally entitled to its benefits and equally liable for its burdens.

If you find one lived on one half and one on the other this is nothing more than the law entitled them to; and if one paid the taxes on her half and the other on hers this is nothing but what the law requires them to do. The fact of one living on one half
35 and the other on the other, or of one paying the taxes on one half and the other the taxes on the other, no matter how long this was kept up, would not give either one a fee-simple title to the particular half on which she lived and paid taxes. At the end of half a century they would still be but tenants in common, each having the right to possess the joint property and to use and enjoy one-half of it.

No tenant in common can set up an exclusive title by prescription against his cotenant in the whole or any part of the property unless he actually ousts his cotenant or expressly notifies his cotenant that he holds adversely to his rights, or unless he assumes exclusive possession of the whole property and refuses to admit his cotenant to his rightful participation after the cotenant demands such admission. If, therefore, you find that Frances & Fanny became simultaneously entitled to the use and enjoyment of this lot they were tenants in common, and are so still, unless you find that Fanny has taken some of the steps above mentioned against Frances and follows it up with adverse possession for seven years
36 under color or twenty years without it.

4. The next of kin to Tom Gardner, as the words are used in the deed of 1854, mean his nearest blood relations after his own child Frances. A man's nearest blood relations after his own children are his grandchildren. Tom Gardner's grandchildren are parties respondent to this bill. If Fanny and Frances are tenants in common for life in this land these grandchildren, should

they outlive them, would be entitled to the land, share and share alike. Fanny claims that she has a fee-simple interest in part of this land by possession for twenty years, and consequently that there is no remainder in this part for the next of kin. You cannot find that Fanny has a fee-simple interest in any part of this land by adverse possession for twenty years unless you find that she has been in such possession of such part for the full period of twenty years from the time that free persons of color became vested in this State with the same property rights as white persons.

5. If you find that a good prescriptive title has arisen under this trust deed the effect is that Fanny & Frances will each be entitled for life to the use and enjoyment of one-half of the property,
37 and at their death it goes to the next of kin of Thomas Gardner. If you find that Fanny has a fee-simple interest in the part of the lot whereon she now resides the next of kin of Thomas have no rights whatever therein. Fanny may dispose of it while living as she pleases, and if she dies intestate it would go to her next of kin.

6. If you find from the evidence that the compl't did not set up any claim to the property in dispute by having furnished part of the purchase-money until twenty years had expired from the time the purchase was made I charge you that she is now barred by the statute of limitations from setting up title to the property for that reason.

SALEM DUTCHER,
THOS. S. BEAN,
Att'ys for the Respondents.

The above requests to charge are respectfully declined.
E. H. POTTLE, *Judge.*

38 GENTLEMEN OF THE JURY: This is a proceeding in equity instituted by Fanny Gardner, setting up a title to one-half of a certain lot of land in the city of Augusta. The bill recites that in 1854 one John Carrie made a deed to this lot to Thomas Gardner in trust for the use and benefit of Fanny Gardner, the wife of Thomas, and Frances, her daughter, and, at the death of his wife, to his next of kin in life at that time. All sides admit that Thos. Gardner, his wife and children, were all free persons of color. The bill prays that the deed may be considered void and of no effect. It further states that Thomas Gardner bought the land with the money of his wife and that Thos. Gardner died in Nov., 1865. Thomas Gardner died and she claimed on the distinct ground of title that she and her daughter Frances are the only heirs-at-law of Thos. Gardner, and by inheritance they take the lot jointly between them for the lifetime of Fanny, but in fee simple or absolutely, each being entitled to one-half of the lot. The bill, moreover, states that the lot was divided between them, the line of separation being the fence. This is the case stated by the plaintiff.

On the other hand, the counsel for the def't allege in the answer,

admitting that the trust deed was originally void, that under
39 this deed *that* Frances and her children took a title to the whole of the lot at the death of Fanny; that Frances had been in possession of one-half of the lot for more than seven years, and that she acquired what is called a title by prescription to it. In the opinion of the court the case turns mainly upon matters of law, and I charge you as follows:

Under the law in force at the time of making this deed free persons of color could not hold real estate, and the deed from Carrie to Gardner in trust was absolutely void, and the fact that the war and its results as declared by the Constitution of the United States and the acts of our own Legislature have put all colored persons on the same footing with white persons do not and cannot make the laws valid or validate any title acquired under them, and no continuance of possession for any number of years by the wife and daughter under this void deed can ripen it into a good title. The transaction being illegal and void, no act of either and no post-war enactments can galvanize it into life.

If you believe that Thomas Gardner paid Carrie for this land, it being admitted that there were no proceedings before 1860 to escheat this property, and remained in possession of the land until after
40 the close of the war, and died in November, 1865, then, notwithstanding the law which made a trust deed void and he died in possession of the land, the wife and daughter took this estate by inheritance absolutely, each being entitled to one-half. If the evidence does not show that, but shows that Thomas Gardner paid the purchase-money and went into possession and then divided the lot between Fanny & Frances, and that they both went into possession and remained in possession until after the war closed and are still in possession, Frances is estopped from denying the title of Fanny to the one-half now claimed by her; so that you see that my view of the law is that the trust deed cannot be enforced or be made the basis of any title. If, therefore, you find for the complainant, Fanny, you may appoint three discreet persons to make the division of the lot, providing for a sale in case no division of the kind can be made.

Filed in open court this June 28, 1884.

JNO. W. TALIFERRO,
Deputy Clerk R. S. Court.

We, the jury, find for the complainant the exclusive right and fee-simple title to that portion of said property now occupied by her.

GEO. S. MURPHEY, *Foreman.*

41 FANNY GARDNER *vs.* FRANCES BEATTY *et als.* } Verdict for Complainant at April Term, 1884, and Motion for New Trial.

Counsel consenting, ordered that respondents have until thirty days after final adjournment of the present term of court to perfect and file their motion for a new trial in said cause and to file therewith a brief of the evidence therein under revision of Hon. E. H.

Pottle, judge of the superior courts of the northern circuit, presiding at the trial of said cause, and that said motion be heard and determined in vacation by said presiding judge (or, should he be out of the State or prevented by providential cause from presiding at such hearing, by any other judge of the superior courts of this State) at any time after said filing or ten days' notice by either party, with liberty of exception to the judgment on said hearing as in term time.

This July 5th, 1884.

H. C. RONEY, *J. S. B. A. L.*

FOSTER & LAMAR,
Compl't's Sol's.
SALEM DUTCHER,
THOS. S. BEAN,
Resp'ts' Sol's.

42 *Motion for New Trial.*

FANNY GARDNER, Compl't,
vs.
FRANCES BEATTY, THOMAS A. BEATTY, and THOS. H. Beatty, Guardian *ad litem* of Alexina Beatty; James R. Davis, Wm. Henry Davis, Addie Viola Davis, and —— Davis, Minors, Respondents. } Equity.

Equity. Tried at the April adjourned term, 1884, of Richmond superior court—Hon. E. H. Potts, judge superior court of northern circuit, presiding—on June 26, 27, 28, 1884, and verdict finding compl't entitled in fee simple to that part of the land in question whereon complainant resided at the time of verdict.

And now comes respondents in said cause, and in terms of consent order at said term taken therein perfecting their motion for new trial, move the court for a rule *nisi*, to be to complainant or her counsel directed, calling on them to show cause why said verdict should not be set aside and a new trial of said cause awarded on the grounds following, to wit:

1st. Because, over respondents' objection that the same constituted a new cause of action, the court allowed compl't, on the second day of said trial, to amend her bill as follows, to wit:

43 "And compl't further shows that one-half of the purchase-money of said property was by her furnished to Thos. Gardner at the time of the purchase, said money being the proceeds of her labor as a free person of color. June 27th, 1884."

2d. Because, over respondents' objection that the same constituted a new cause of action, the court allowed complainant, on the third day of said trial, to amend her bill as follows, to wit:

"By leave of the court first had and obtained, compl't amends her bill and says that if this honorable court should hold that in the division of said lot by the said Thomas Gardner, in which he gave to your oratrix the portion on which she has since lived, that she

acquired no legal interest therein and no interest that has or could ripen by prescription, then and in that event she says that the said Thomas Gardner, if his gift to your oratrix was to be counted as no gift, died in possession of said lot, leaving as his only heirs your oratrix and respondent, Frances Beatty; that the said heirs have by tacit consent actually occupied, held, and claimed the shares or portions so as aforesaid divided to them by said Gardner from the time of his death to the present; that said Gardner made no will and left no other heirs." June 29, 1884.

44 3d. Because the court allowed compl't to testify in support of the allegation that one-half of the lot in question was hers by purchase; that she had furnished out of her own property and savings to Thos. Gardner at the time of the purchase of said lot by said Thomas, in 1854, one-half of the purchase-money then paid by said Thomas therefor, over objection of respondents that said Thomas, one of the original parties to said alleged contract of purchase, being dead, compl't as the other party thereto was not a competent witness to testify in her own favor touching said alleged contract.

4th. Because the court overruled respondents' motion to rule out the testimony of complainant that she had furnished out of her own property and earnings to Thomas Gardner, at the time of purchase of the lot in question by said Thomas, in 1854, one-half of the purchase-money then paid by said Thomas therefor, said motion to rule out being based on the ground that said complainant, being the wife of said Thomas in 1854, any property brought by her into or earned or acquired by her during the coverture was the property of said Thomas as the husband of complainant.

5th. Because after Edwin V. Sharp, a witness for the re-

45 spondents, had testified that William Phillips, a surveyor by profession, had made in the year 1853 a survey of the lands of John Carre, in the city of Augusta, Georgia, covering the lot in question and made a plat thereof; that said Phillips had committed this original plat or duplicate thereof, among other papers, to the custody of witness; that on said plat or duplicate the words "E. D. Robertson, F. C. Barber" were written in the handwriting of said Phillips across the lot in question; that from said plat or duplicate, while thus in his possession, witness made an exact copy, showing said lot with said names thereon; that witness had returned said original plat or duplicate to said Phillips; that said Phillips was dead and witness knew not where said original plat was; that witness had made search in the office of the clerk of Richmond superior court, where such plats are recorded, for a record copy of said original, but failed to find such record, and after complainant had offered in evidence said copy made by witness, hereto attached, marked "A," the witness first identifying it as made by him as stated in his testimony, the court ruled out said copy plat on complainant's motion and over objection of respondents' first request, the same being as follows, to wit:

46 "The case made by the pleadings in this case is, in brief, as follows:

The complainant, Fanny Gardner, prays that that portion of the lot on which she now resides be decreed to be hers absolutely. She says this should be done for two reasons: 1st, because she has a good prescriptive title in fee simple to that portion by twenty years' possession thereof; 2dly, because she contributed one-half of the purchase-money of the whole lot; and, 3dly, that she has a good title as heir to Thomas Gardner. She says she wants to sell that portion of the lot to which she lays claim, but that respondents have prevented her from finding a purchaser by setting up that she only had a life estate in common with the respondent, Frances Beatty, in the whole lot, under the trust deed of 1854. She says this deed is void because it conveys realty in Augusta, Ga., in trust for the benefit of free persons of color, contrary to the laws of Georgia.

The respondents deny that complainant has a fee-simple title to any part of the lot. They say that, even if the deed of 1854 was void when made, complainant and respondent- went into possession under it; that they were in the occupancy of the lot under
47 that deed on the 17th of March, 1866, when the laws of Georgia gave colored people the same property rights as white people: that they were in the occupancy of the lot under that deed on the 9th of April, 1866, when an act of Congress gave colored persons the same property rights in every State as white persons; that they remained continuously in possession of the lot under that deed as color of title for seven years after the 17th of March, 1866, and the 9th of April, 1866; that under the laws of Georgia as of force long prior to 1866, up to the present day, possession of realty under color of title for seven years gives those so holding a good prescriptive title, such as set out in the color of title to that property, and even a void deed, which in and of itself conveys no title on which to base such a prescription —; that by holding under the deed of 1854 for seven years after March 17th, 1866, a good prescriptive title vested both in complainant and respondent, Frances Beatty, according to the terms of that deed; that this title is an equitable estate for life in compl't and Frances as tenants in common, remainder over in fee to Thomas Gardner's next of kin. Respondents deny that complainant has any other title to the lot or any part thereof than the one
48 just mentioned. Respondents, relying specially on the act of Congress of 9th April, 1866, heretofore mentioned, and so much of XIV amendment to the Constitution of the United States as declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, say that the acts of Georgia of 1818 and 1819, prohibiting free persons of color from having any legal or equitable title or interest in realty in the city ot Augusta, in said State, cannot now be lawfully enforced against respondents so as to deny them in this proceeding the full and equal benefit since March 17th, 1866, and 9th April, 1866, of the laws of Georgia as to prescriptive title to realty by seven years' possession under written evidence or color of title the same as if they were white persons.

The issue is therefore as to the nature of complainant's title as respects this land."

7th. Because the court refused to charge respondents' second request, the same being as follows, to wit: "2. If you find from the evidence in this case that Thos. Gardner bought this land for the
49 joint use of Fanny & Frances during their lives, and at their death to go to his next of kin, and had the deed of 1854 made to carry out this purpose, and that Frances & Fanny entered on the occupancy of the land by virtue of this deed and were in the occupancy of the land under the deed at the time free persons of color became entitled to equal property rights under the law with white persons, and remained in such possession and occupancy for seven years thereafter, then I charge you that even if the deed itself were void they obtained a good prescriptive title to the joint use and enjoyment of the land during their lives. The fact that the deed was void, or that Fanny and Frances were free people of color in no-wise prevents such a prescriptive title as stated accruing to them if the evidence shows the evidence above stated."

8th. Because the court refused to charge respondents' third request, the same being as follows, to wit:

"3. Whenever two persons are from any cause entitled to the possession simultaneously of any property in this State they are tenants in common, and entitled to the use and enjoyment of one-half of the common property, and are each liable for one-half of
50 the burdens imposed by law on the common property, such as taxes. If, therefore, you find from the evidence in this case that Fanny and Frances became simultaneously entitled to the possession of this property they were tenants in common, equally entitled to its benefits and equally liable for its burdens. If you find one lived on one half and one on the other this is nothing more than the law entitled them to; and if one paid the taxes on her half and the other on hers this is nothing more than the law requires them to do. The fact of one living on one half and the other on the other, or of one paying the taxes on one half and the other the taxes on the other, no matter how long this was kept up, would not give either one a fee-simple title to the particular half on which she lived and paid taxes. At the end of half a century they would still be but tenants in common, each having the right to possess the joint property and to use and enjoy one-half of it. No tenant in common can set up an exclusive right by prescription against his cotenant in the whole or any part of the property unless he actually ousts his cotenant or expressly notifies his cotenant that he holds adversely to his rights, or unless he assumes exclusive possession of the
51 whole property and refuses to admit his cotenant to his rightful participation after the cotenant demands such admission. If, therefore, you find that Frances & Fanny became simultaneously entitled to the use and enjoyment of this lot they were tenants in common, and are so still, unless you find that Fanny has taken some of the steps above mentioned against Frances and followed it up with adverse possession for seven years under color of title or twenty years without it."

9th. Because the court refused to charge respondents' fourth request, the same being as follows, to wit:

"4. The next of kin to Thomas Gardner, as the words are used in the deed of 1854, mean his nearest blood relations after his own child Frances. A man's nearest blood relations after his children are his grandchildren. Tom Gardner's grandchildren are parties respondent to this bill. If Fanny and Frances are tenants in common for life in this land these grandchildren, should they outlive them, would be entitled to the land, share and share alike. Fanny claims that she has a fee-simple interest in part of this land by possession thereof for twenty years, and consequently that there
52 is no remainder in this part for the next of kin. You cannot find that Fanny has a fee-simple interest in any part of this land unless you find that she has been in possession of such part for the full period of twenty years from the time that free persons of color became vested in this State with the same property rights as white persons."

10th. Because the court refused to charge respondents' fifth request, the same being as follows, to wit:

"5. If you find that a good prescriptive title has arisen under this trust deed, the effect is that Fanny & Frances will each be entitled for life to the use and enjoyment of one-half of the property, and at their death it goes to the next of kin of Thomas Gardner. If you find that Fanny has a fee-simple interest in the part of the lot whereon she now resides, the next of kin of Thomas have no rights whatever therein. Fanny may dispose of it while living as she pleases, and if she dies intestate it would go to her next of kin."

11th. Because the court refused to charge respondents' sixth request, the same being as follows, to wit:

"6. If you find from the evidence that the compl't did not set up any claim to the property in dispute by having furnished
53 part of the purchase-money until 20 years had expired from the time the purchase was made, I charge you that she is now barred by the statute of limitations from setting up title to the property for that reason."

12th. Because the court charged as follows, to wit: "The counsel for the defendants allege in the answer, admitting that the trust deed was originally void, that under this deed Frances and her children take a title to the whole of the lot at the death of Fanny; that Frances has been in possession of one-half of the lot for more than seven years, and that she acquired a title—what is called a title—by prescription, to wit:

13th. Because the court charged as follows, to wit: I charge you as follows: Under the law in force at the time of making this deed free persons of color could not hold real estate, and the deed from Carrie to Gardner in trust was absolutely void, and the fact that the war and its results, as declared by the Constitution of the United States and the acts of Congress and the acts of our own Legislature, have put all colored persons upon the same footing with
54 white persons do- not and cannot make these laws invalid or validate any titles acquired under them, and no continuance

of possession for any number of years by the wife and daughter under this void deed can ripen into a good title. The transaction being illegal and void, no act of either and no post-war enactments can galvanize it into life."

14th. Because the court charged as follows, to wit: "If you believe Thomas Gardner paid Carre for this land, it being admitted that there were no proceedings before 1860 to escheat the property, and remained in possession of the land until after the close of the war, and died in November, 1865, then, notwithstanding the laws which made the trust deed void, and died in possession of the land, the wife and daughter took this estate by inheritance absolutely, each being entitle- to one-half. If the evidence does not show that, but shows that Thomas Gardner paid the purchase-money and went into possession, and then divided the lot between Fanny and Frances, and that they both went into possession and remained in possession until after the war closed, and are still in possession, Frances is estopped from denying the title of Fanny to her one-half now
55 claimed by her. So you see that my view of the law is that the trust deed cannot be enforced or be made the basis of any title."

SALEM DUTCHER,
THOS. S. BEAN,
Resp'ts' Sol'rs.

I certify that the grounds of the within are correctly stated, as far as they relate to the conduct and rulings of the court, except that I do not approve the statement in the third ground that the testimony of the complainant was objected to by defendants' counsel. I do not recollect it.

July 18, 1884.

E. H. POTTLE,
Judge Sup'r Court, N. C.

Rule *nisi* waived, and service of a copy of the within motion for new trial acknowledged this July 21, 1884.

FOSTER & LAMAR,
Sol's for Compl't.

Filed in office July 21, 1884.

WM. E. KEENER, *Clerk.*

56 FANNY GARDNER
vs.
FRANCES BEATTY *et als.*

Brief of Evidence.

Oral testimony f. complain't.

W. C. JONES sworn:

Am city asses-or and sheriff of city of Augusta, Georgia; been such for a number of years past; identify signatures to receipt to Fanny

Gardner for taxes due city of Augusta for years 1868, 1869, 1871, 1872, 1873, 1874, 1876, 1877, 1878, and 1879 as my own or that of proper receipting office-; have known the property in question since 1873. It has been divided ever since I knew it. There is a fence dividing the parts on which Fanny Gardner and Frances Beatty lived. The tax rece-pt for 1861, signed E. Bustin, collector & treasurer, is in the handwriting of Mr. Bustin, who at the time was collector & treasurer of the city of Augusta and the proper person to receipt for taxes.

(2.) Cross:

Remember telling respondent-'counsel that since this suit Fanny paid two or three years' taxes at one time; think Mr. Davenport Jackson paid them. I identify book shown, marked city tax
57 book, as one of the official tax books of the city of Augusta. The entry therein in the words, F. C. Barber for Gardners, col'd, 1 house & lot, W. W. cor. Campbell (Adams St.), 1864, $750; 1865, $750, means that Mr. F. C. Barber returned the lot in question in 1864 & 1865 for Gardners, colored persons. In 1866 the lot was transfer-ed on the tax book to name of F. E. Gardner. I take it to be T. E. You can — "Tom" has been written and T. E. over it.

FANNY GARDNER, the complainant, sworn:

Was wife of Tom Gardner; lived with him till he died; he died in my arms, with small-pox. Tom bought the property from Mr. Carre. He got from me $250 in silver and $34 I had sold a house of my own in Savannah for, which stood on leased land, to help pay for the lot. I was always free; was a sempstress; worked constantly for Mrs. Habersham and other white ladies, and thus made the $250. When Tom bought the lot I went to my trunk and got first the $250, which was all in silver, and we counted it out on the table. Then I gave him the $34 which I got for the sale of my house. Then he got his money, counted it, and paid Mr. Carre for the lot. I paid half and he half. After
58 Tom bought the lot he built the house where I now live. First Tom, Frances, and myself lived in it together until Frances married Beatty. Tom then cut the lot in two and built Frances a house (the one in which she lived until it burnt down, last year) on the other half of the lot. Tom then told me and Frances often that the house and lot occupied by Frances was hers and that occupied by me was mine. He died understanding that he had divided the property between us. The lots have had a fence between them ever since Frances married, before the war begun. I have lived upon my half ever since and paid the taxes upon it ever since Tom died. Frances has lived on hers. I married Tom three or four years before he bought the lot. Tom died before the war.

Cross:

I moved up to Augusta from Savannah when Tom married me. He married me in Savannah. We were both free. Tom was a dray-

man. My mother had a little house in Savannah. She died before Tom bought the lot. I had five brothers. My mother's house was sold and the money divided between me and my brothers. I
59 got one-sixth of it. Nobody was present but me and Tom when he counted out the money that bought the lot. Tom died before the war. On reflecting, say he died the end of the year after the war closed.

Oral Testimony for Respondents.

L. T. BLOME sworn:

Am clerk of the city council of Augusta. The book shown, marked "Sexton's Book, Negroes," is one of the official books of the city kept of file in my office. It shows interments in the colored cemetery of the city. The entry therein in the words "Thomas Gardner (c.), November 24th, 1865, small-pox, 3 ward," means that a colored man named Thomas Gardner, living in the third ward of the city, was buried in the colored cemetery on Nov. 24th, 1865, and that the cause of his death was small-pox.

No cross.

EDWIN V. SHARP sworn:

Am surveyor by profession; identify the paper shown me (and marked "A" by order of the court to identify it) as one drawn by me; drew it several years ago during this suit at the request of Mr. Dutcher, respondents' counsel, who asked me for information as to plats or surveys of the lot in question. I drew the paper, which is a plan
60 of the lot in question, with the names "E. D. Robertson, F. C. Barber" written across it. On the following was Wm. Phillips, formally a surveyor in Augusta, now dead, — gave me a number of plats of surveys made by him, among other papers, to keep during his absence from Augusta. Of some of thes- papers I made copies. Among his papers I found a drawing purporting to be a copy of a plat of the lands of Mr. John Carrie, in Augusta. It is the custom of surveyors to make a copy *of* duplicate of their plats. This copy plat was in Mr. Phillips' handwriting, which I know well. Across the lot in question in this case the names "E. D. Robertson, F. C. Barber" were written in Mr. Phillips' handwriting. I made a copy of the plat and had it until some time since. When Mr. Phillips returned to Augusta I returned his papers, this plat of the Carrie lands among them. Mr. Phillips is dead; died before this suit was brought. I don't know where the original plat now is. It is the custom to record such plats in the office of the clerk of this court. I have made search there and find other plats recorded, but not this one. As I stated, I made a copy from the copy found in his papers when they were in my possession. This copy I cannot find. I have looked over my
61 papers and can't find it. The paper marked "A" I made from the copy I made from the Phillips copy. That Phillips copy had the names across the lot just as the paper "A" has. The plat

from the office of Mr. Davidson, the city survey- (that plat being shown witness), is a copy also. It is marked "copy." Compairing Mr. Davidson's copy and the paper "A" you can see these are from the same original. Mr. Davidson's is on tracing paper and must have been traced from some other paper. I am satisfied Mr. Davidson must have got his plat from the original or some copy of it. The dimensions on Mr. Davidson's copy are the same. Put one paper over the other and the lines of the lot coincide. His plat has not the names on this lot.

Cross:

Paper "A" is a copy of a copy of a copy. I copied the copy in Mr. Phillips' handwriting and made paper "A" from my copy when Mr. Dutcher asked me about the early history of the lot. I don't recollect if *their* were names on all these lots in the original plat. My attention was only directed to this lot corner of Campbell and Miller streets, and, as you see paper "A" only copies the square on which that lot was, there may or may not have been names
62 on all. I think the original ought to be in city surveyor's office, but Mr. Davidson's plat is a copy. I don't know how Mr. Phillips came to write the names E. D. Robertson, F. C. Barber across this lot or what was — authority for so doing; only know he made a survey and plat of the Carrie land by seeing the copy plat in his handwriting among his papers. Surveyors may make *make* a survey and then a long time after a plat. They generally *the* date the plat when made and not with the date of the survey. From Mr. Davidson's plat it seems Borden laid of- the lots.

PATRICK GOULD sworn:

I know Tom Gardner; worked with him; know when he bought the lot; there was no house on it at that time. Tom built two houses on the lot. He tore down some houses he had down by the railroad and moved them on the lot. I helped him put them up. He put two houses. Frances, his daughter, was then a small girl. I never heard of any claim of Fanny as to her giving Tom money to buy the lot until to-day, in the court-house. I have known Tom & Fanny ever since Fanny came from Savannah; never heard Tom say Fanny had given him any
63 money to buy the lot. Tom was a drayman. He run seven horses and drays. He made right sharp money; was an industrious man.

No cross.

FRANCIS BEATTY (now Davis), one respondent, sworn:

I am the daughter of Tom Gardner; think I am about 39 years old. My first husband's name was Aleck Beatty, and I married him in 1858; have since married John A. Davis, my present husband. I have six children; they are named Thos. Alexander Beatty and Alexina Beatty—these are by my first husband—and

James R. Davis, William Henry Davis, Addie Viola Davis, and —— Davis. Tom is grown; the others are small children, from twelve or thirteen — old down. My father built two houses on the place; they were built before I was first married. Mr. F. C. Barber was guardian for my step-mother & myself. He attended to my father's business. Before I was married I lived with my father in the house where my step-mother, Fanny, now lives; then I lived in the other house. My father told me that after his wife's death he wanted the property to go to his heirs. He told me to go to Mr.
64 McLaws, called Judge McLaws—that is, Wm. R. McLaws, now dead—if ever I got in trouble about the land. My father told me the lot Fanny claims was to go, after her death, to his heirs—all the lot was to go. Fannie's mother did not die until several years after the houses were built. When I was first married we went on our bridal trip to Savannah, and I saw Fanny's mother there then, and was at her house. My father put a fence between the lots when he built the houses. He run the fence to keep his horse away from the house we lived in. I never heard Fanny ever claim that she gave my father any money to buy the lots with till now. I have always paid the taxes on the part I live on, and my step-mother has paid on the part she lives, until the last few years, when they lived on that part, for the taxes, and to save it I was obliged to pay all the taxes. Mr. Bean paid them for me. I have paid all my taxes. Fanny owes yet for 1883.

65 *Documentary Evidence for Complainant.*

1. Trust deed of 1854.
2. Tax receipts to compl't for city of Augusta taxes for 1868, 1869, 1871, 1872, 1873, 1874, 1876, 1877, 1878, & 1879; also one for 1861, signed by E. Bustin.
3. Agreement of counsel — copy — deed annexed to the bill to be used in lieu of lost original; also that respondent, Frances Beatty, claiming that she & compl't had only life estate in lot, remainder to Tom Gardner's next of kin, had objected to complainant selling as hers, in fee simple, portion of lot resided on by complainant.

Documentary Evidence for Respondents.

1. Book marked "Sexton's Book—Negroes," showing entry: "Thos. Gardner (c.), Nov. 24, 1865, small pox, 3 ward."
2. City of Augusta tax book, showing entries: "F. C. Barber for Gardner (col'd), 1 house and lot, N. W. cor. Campbell (Adams St.), 1864, $750; 1865, $750."
3. Minutes of Richmond superior court for Dec. 20, 1856, Book "1855," folios 352–'3: Appointment of F. C. Barber as guar-
66 dian of Fanny Gardner and Frances Gardner, wife and daughter of Thomas Gardner, drayman, of Augusta, Ga., free persons of color, on petition of s'd Frances & Fanny.
4. Admission that following occur-ed in court of ordinary, R. C.

4. Temporary letters of administration issued on estate of Tom Gardner to F. C. Barber on Jan. 23, 1866.

March 5, 1866.—Permanent letters to same on estate of same.

Jan'y 24, 1866.—Warrant of apprais-ment on estate; same. Jan. 24, 1866, return of appraisers under said warrant that two horses, two drays, one set harness, one wagon—all intestate's estate produced by administration.

M'ch 6, 1866.—Affidavit of F. C. Barber, adm'r est. Tom. Gardner, above, all intestate's real or personal estate.

5. Plat of Carrie land from city surveyor's office.

6. Papers "A" (ruled out and hereto appended).

7. Tax receipts to Frances Beatty and tax *fi. fas.*, City of Augusta *vs.* Fanny Gardner, for 1880, 1881, and 1882, with entries thereon.

67 Agreed to as correct July 16, 1884.

FOSTER & LAMAR,
Compl't's Sol's.
SALEM DUTCHER,
THOS. S. BEAN,
Resp'ts' Sol'rs.

Filed in office July 21, 1884.

WM. E. KEENER, *Clerk.*

STATE OF GEORGIA, }
Richmond County. }

This indenture, made this third day of May, in the year of our Lord one thousand eight hundred and fifty-four, between John Carrie, of the city of Augusta, county and State aforesaid, of the one part, and Elijah D. Robertson, of the same place, of the other part, witnesseth:

That the said John Carrie, for and in consideration of the sum of six hundred dollars to him in hand well and truly paid by the said Elijah D. Robertson at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, *relieve*, convey, and confirm, unto the said Elijah D. Robertson, his heirs and assigns—

All that lot or parcel of land situate, lying, and being on
68 the south side of Miller street, city of Augusta, county and State aforesaid, bounded on the north by said street, on the east by Campbell street, on the south by lot owned by said John Carrie, and on the west by an alley, said lot or parcel of land having a front on Campbell street of eighty-two feet six inches, more or less, and running back to said alley two hundred feet, more or less, in trust, nevertheless, to and for the sole use, benefit, and behoof of the following persons, of free color, of said county and State, to wit: Fanny Gardner, the wife of Thos. Gardner; their daughter, Frances Gardner, and any future issue of the said Fanny by the said Thomas; and in the case of the death of the said Frances and Fanny, in trust for the next of kin of the said Thomas Gardner; and the said Elijah D. Robertson is hereby authorized and empowered, in case it should

be deemed advisable and to the interest of all concerned that a sale of said property should take place, to sell and make titles to the same, provided the consent of the said Francis & Fanny, their guardian or guardians, if any, being first had and obtained, together with all and singular the rights and appurtenances
69 thereof whatsoever to the said lot or parcel of land being, belonging, or in anywise appertaining, and the remainders, reversions, rents, issues, and profits thereof and every part thereof;

To have and to hold the said lot or parcel of land and all and singular the premises and appurtenances thereto belonging as aforesaid and every part thereof unto the said Elija D. Robertson, his heirs and assigns forever; and the said John Carrie and his heirs and all and every other person and persons whomsoever shall and will warrant and defend these presents, subject to the rights and trusts hereinbefore set forth.

In witness whereof the said John Carrie hereunto set his hand and seal the day and year above written.

JOHN CARRIE. [L. S.]

Sealed and delivered in presence of—
R. D. GLOVER.
WM. R. McLAWS, *N. P., R. C.*

70 GARDNER *vs.* BEATTY *et als.*

We agree that Fanny Gardner, complainant, paid taxes to the city of Augusta on that part of the lot in question occupied by her from 1868 to 1879, and that Frances Beatty paid like taxes to 1884 on that part of the lot resided on by her; also that city of Augusta tax executions for 1880, 1881, & 1882, issued against complainant and were levied on said portion occupied by her and were transferred to J. S. Bean, cashier; also that Frances Beatty (claiming that she and complainant had only a life interest in the lot in question, remainder to Tom Gardner's next of kin) objected to complainant's selling as heir in fee simple the portion of said lot resided on by compl't when complainant undertook to sell same, as set out in her bill.

FOSTER & LAMAR,
Compl't's Sol's.
SALEM DUTCHER,
THOS. S. BEAN,
Resp'ts' Sol'r.

Rec'd, Augusta, Aug. 20, 1861, from F. C. Barber, for Gardner, six $\frac{25}{100}$ dollars for his city taxes for the year 1861—500, real est.—6.25.

E. BUSTIN,
Collect. & Treas. C. A.

71 GEORGIA,
Richmond County.

To the honorable the superior court of said county:

The petition of Fanny Gardner and Frances Gardner, free persons of color and wife and daug-ter of Thomas Gardner, a drayman, all residents of Augusta and State of Georgia, respectfully showeth unto your honor that they are without guardians, and humbly — your honor to appoint Mr. F. Barber, of said city, *that* guardian; and they further show unto your honor that they have no property.

And as in duty bound, &c.

WM. R. McLAWS,
Att'ys — Petitioner.

I consent to act as guardian of Fanny Gardner and Frances Gardner, the wife and daughter of Tom Gardner, they being free persons of color.

F. C. BARBER.

Upon hearing foregoing petition, ordered that it be granted and the clerk issue letters of guardianship to said F. C. Barber.

WM. W. HOLT, *Judge.*

(Here follows diagrams marked pp. 72 & 73.)

74 GARDNER *vs.* BEATTY *et als.* } Equity.

We agree that the motion for new trial in said cause be submitted to Hon. E. H. Pottle, presiding at trial, without argument; also that the court may use original of documentary evidence used on trial.

Counsel disagree as to the 3d ground of motion for new trial, viz., that testimony of complainant as to paying part of purchase-money, &c., was inadmissible, the other party to alleged contract being dead, complainant's counsel claiming such objection was not made, respondents' counsel claiming it was made. This July 16, 1884.

FOSTER & LAMAR,
Compl't's Sol's.
SALEM DUTCHER,
THOS. S. BEAN,
Resp'ts' Sol's.

FANNY GARDNER *vs.* FRANCES BEATTY. } Equity. In Richmond Superior Court & Motion for New Trial.

After considering this motion, it is ordered that the motion for new trial be overruled. The clerk of Richmond sup. court is ordered to enter this judgment on the minutes of the court.

E. H. POTTLE,
Judge Sup'r Court, N. C.

July 25, 1884.

75 WARRENTON, *July* 18, 1884.

DEAR SIR: I agree with Mr. Foster that there was no point made on the competency of the witness. There was no such question made at the time, except in Mr. Fleming's case. Indeed, it is an immaterial matter, as the case did not turn on the equity of the wife, and I made no allusion to it in my charge.

I approve the papers with this exception, and return them to you.

I am very truly y'rs, E. H. POTTLE.

Col. S. Dutcher.

STATE OF GEORGIA,
Richmond County.

I, William E. Keener, clerk of the superior court of the county and State aforesaid, do hereby certify the foregoing pages to be a full, true, and complete copy and transcript of the record in the case of Fanny Gardner *vs.* Frances Beatty, from the commencement of said case until its final termination in said court.

Witness my hand and seal of said court this 11th day of August, 1884.

WILLIAM E. KEENER,
Clerk Sup'r Court, Richmond County, Georgia.

76 In the Supreme Court of the State of Georgia. September Term, 1884.

FRANCES BEATTY, THOMAS ALEXANDER BEATTY, and Thomas Alexander Beatty, Guardian *ad litem* of James Richard Davis, William Henry Davis, Addie Viola Davis, and —— Davis, Minors, Plaintiffs in Error, *vs.* FANNY GARDNER, Def't in Error.	No. 22. Augusta Circuit. Equity. From Richmond Superior Court.

And now, at said term of said supreme court, comes plaintiffs in error in said cause, by their att'y of record, Salem Dutcher, and, suggesting, give said supreme court here to know that, pending said cause in said supreme court, the defendant in error therein, to wit, Fanny Gardner, departed this life, and that by a certain record of the court of ordinary of Richmond county, Georgia, which record, in a duly certified copy thereof, is in the words and figures following, said certified record being here to the court shown, to wit:

STATE OF GEORGIA,
County of Richmond.

In the name of God, amen:

77 I, Fanny Gardner, being old and feeble, but of sound memory and disposing mind, do make this as my last will and testament, hereby revoking all others by me heretofore made:

First.

I desire all my just debts to be paid.

Second.

I nominate, constitute, and appoint my grand-daughter, Georgia Benton, as the executrix of this my last will and testament.

Third.

I own a lot of land on the corner of Campbell and Miller streets, in the city of Augusta, county aforesaid, which ownership was in the case of Fanny Gardner *versus* Frances Beatty, in Richmond superior court, on the 28th day of June, 1884, confirmed by the verdict of the jury therein. Said property is subject to the claim of Mess. Foster & Lamar for one-half thereof for professional services in reference thereto. All my right, title, interest, and estate in said land I give, devise, bequeath unto my said grand-daughter, the said Georgia Benton, with the right in her to dispose of the same at her pleasure, without the order of any court, by deed, gift, or otherwise,
and if she shall not sell or otherwise dispose of the same,
78 with the further right to dispose thereof by will, and in default of such disposition by deed or will, then to the heirs of her body.

Fourth.

All the rest and residue of my property, real and personal, I give, devise, and bequeath unto the said Georgia Benton forever.

In witness whereof I, the said Fanny Gardner, have hereto set my hand and seal this thirteenth day of June, 1884.

her
FANNY E. x GARDNER.
mark.

Signed, sealed, published, and declared by the said Fanny E. Gardner as and for her last will and testament in the presence of us, who, at her request and in her presence and in the presence of each other, have set our hands as witnesses hereto June 30th, 1884.

SEBASTIAN C. DURBAN.
JAMES J. WOOLFORK.
JOHN O. TYLER.

79 STATE OF GEORGIA, }
Richmond County. }

Probate. In the Court of Ordinary for Richmond County.

Personally appeared before me, in open court, John O. Tyler, a subscribing witness to the foregoing instrument of writing, who, being duly sworn, saith he was present and did see Fanny E. Gardner, the within named —, sign, seal, publish, and declare the same to be her last will and testament; that she was of sound and disposing mind and memory, and that this deponent, together with Se-

bastian C. Durban and James J. Woolfork, signed the same as witnesses at the request and in the presence of the testatrix and of each other.

JOHN O. TYLER.

Sworn to before me this third day of November, 1884.

A. W. WALTON, *Ordinary.*

STATE OF GEORGIA,
Richmond County.

In the Court of Ordinary for said County.

I, Georgia Benton, do solemnly swear that this writing contains the last will of Fanny E. Gardner, deceased, so far as I know or believe, and that I will well and truly execute the same in ac-
80 cordance with the laws of this State, so help me God.

GEORGIA BENTON.

Sworn to and subscribed before me this third day of November, 1884.

A. W. WALTON,
Ordinary, R. C.

Court of Ordinary, Richmond County. November Term, 1884.

MONDAY, *November 3rd*, 1884.

Present: A. W. Walton, ordinary.

The last will and testament of Fanny E. Gardner, late of Richmond county, deceased, was presented to the court, and the same having been duly proven upon the oath of John O. Tyler, one of the subscribing witnesses to said will—

It is ordered that said will be, and hereby is, admitted to record, and Georgia Benton, the executrix in said will named and appointed, having taken the oath prescribed by law—

It is ordered that letters testamentary issue to her accordingly.

A. W. WALTON, *Ordinary.*

Letters Testamentary.

STATE OF GEORGIA,
Richmond County.

81 By the court of ordinary for said county.

To all to whom these presents shall come, Greeting:

Know ye that on the third day of November, in the year of our Lord one thousand eight hundred and eighty-four, the last will and testament of Fanny E. Gardner, late of said State and county, deceased, was exhibited in open court and in common form of law proved and admitted to record, a copy of which is hereunto annexed, and administration of all and singular the real estate, goods, chattels, and credits of said deceased was granted to Georgia Ben-

ton, the executrix in by said will named and appointed, she having first taken the oath and performed all other requisites required by law, she, by order of said court and by virtue of these presents, — legally authorized to administer the real estate, goods, chattels, and credits of said deceased according to the tenor and effect of the said will and testament and according to law, and she is hereby required to render a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased, and appraised and returned to this court according to law, and to render a true and correct account to the said court of her actings and
82 doings yearly and every year until her administration is fully completed.

Witness my hand as ordinary and seal of said court
[SEAL.] this third day of November, eighteen hundred and eighty-four.

A. W. WALTON, *Ordinary.*

Certificate.

STATE OF GEORGIA, }
Richmond County. }

ORDINARY'S OFFICE.

I, Alexander R. Walton, clerk of the court of ordinary of Richmond county, State of Georgia, do hereby certify that the foregoing copy of the last will and testament of Fanny E. Gardner, late of said county, deceased, of the probate to said will and the order admitting the same to record, and of the letters testamentary issued to Georgia Benton, the executrix of said will, are true and correct copies as taken from the records of the court of ordinary of said county.

In witness whereof I have hereunto set my hand and affixed the seal of the court of ordinary, at the city of Augusta, county and State aforesaid, the 18th day of November, in the year of our Lord one thousand eight hundred and eighty-four.

A. R. WALTON,
[SEAL.] *Clerk of the Court of Ordinary, Richmond Co., Ga.*

83 It appears that a certain instrument of writing, purporting to be the last will and testament of said Fanny Gardner, styling herself Fanny E. Gardner, executed June 30th, 1884, was proven in common form in said court of ordinary on Nov. 3, 1884, and that on Nov. 3, 1884, letters testamentary issued in and by said court of ordinary to Georgia Benton, the nominated executrix in said will; that said executrix hath not voluntarily appeared in this supreme court and been made party defendant in error therein in the stead of the said original defendant in error therein, Fanny Gardner. Wherefore said plaintiffs in error move this honorable supreme court for an order that unless said nominated executrix, Georgia Benton, do voluntarily come in as party defendant in said cause in terms of the statute and rule of court in this behalf made

said plaintiffs in error do have leave to open the record in said cause and proceed to a hearing therein pursuant to said statute and rule.
Nov. 24th, 1884.

SALEM DUTCHER,
Att'y for Pl'ffs in Error.

84 In the Supreme Court of the State of Georgia. September Term, 1884.

FRANCES BEATTY, THOMAS ALEXANDER Beatty, and Thomas Alexander Beatty, Guardian *ad litem* of Sarah Alexina Beatty, James Richard Davis, William Henry Davis, and —— Davis, Minors, Plaintiffs in Error,
vs.
FANNY GARDNER, Defendant in Error.

No. 22. Augusta Circuit. Equity. Richmond Superior Court.

Plaintiffs in error in above-stated cause duly suggesting the death of defendant in error therein pending said cause in this supreme court and qualification of Georgia Benton as executrix of said defendant, ordered, that unless said executrix do voluntarily make herself party defendant in error therein said plaintiffs in error do have leave to open the record of said cause and proceed to a hearing therein, pursuant *the* section 4281 of the Code of Georgia and the twenty-sixth rule of this supreme court.
This Nov. 24th, 1884.

85 GEORGIA,
Richmond County.

Be it remembered—
First. That to the April term, 1879, of the superior court of said county, Fanny Gardner, the complainant, brought her bill in equity against Fanny Beatty, formerly Gardner, respondent, showing that on the third day of May, eighteen hundred and fifty-four, one Thomas Gardner, husband of compl't, and father, by a former wife, of respondent, all parties being free persons of color, purchased from one John Carrie, for six hundred dollars, a certain lot of land situate in the city of Augusta, in the State of Georgia, on the south side of Miller street, bounded on the north by said street, on the east by Campbell street, on the south by lot now or formerly owned by said Carrie, and on the west by an alley, and having a front on Campbell St. of eighty-two feet six inches, and running back to said alley two hundred feet; that said land was purchased for the use and benefit of said Thomas and of complainant and respondent; that at the special instance and request of said Thomas said Carrie made a deed of conveyance of said lot to one Elijah D. Robertson in trust for the use, benefit, and behoof of complainant and
86 respondent, as provided by the terms of said deed; that said Robertson never accepted the trust set out in said deed, nor

was any trustee appointed in his place, nor was said lot ever managed or controlled by any trustee, but that on the making of said deed said Thomas and complainant and respondent took possession of said lot; that prior to the late war respondent married, whereupon said Thomas divided said lot and erected a house on one portion thereof for respondent; that thus said parties remained in peaceable possession of said lot until 1867, when said Thomas died intestate; that since his death to the bringing of the bill respondent remained in possession of said portion of the lot and compl't on the other; that said deed to Robertson was null and void, because at that time all conveyances of real estate in the city of Augusta to or in trust for free persons of color were expressly prohibited by law; that respondent acquired title to the portion of said lot occupied by her through actual adverse possession for twenty years, and respondent in like manner acquired title to the part occupied by her; that complainant, being old and unable to work and the rent of the portion of said lot occupied by her being insufficient to maintain her, desires to sell said portion, and has found a purchaser
87 therefor, but that respondent has prevented such would-be purchaser from buying by claiming that under said trust deed complainant has only a life interest in said portion, and that she, respondent, has a remainder interest therein, and that said portion could not be sold without her, respondent's, consent; that thus respondent slanders the title of complainant to said portion and casts a cloud thereon; that such acts of respondent are contrary to equity, and complainant has no adequate remedy therefor save in a court of chancery; wherefore complainant prays, first, that complainant be decreed to have a fee-simple title in the portion of said lot occupied by her, and that said trust deed be cancelled; second, that if the court should hold that the title of complainant and respondent is derived from seven years' possession under said trust deed as color of title it decree that said deed do not limit complainant's title in said property; third, that if complainant be held not to have a fee-simple title in said portion she and respondent be decreed to be tenants in common of the entire lot, and that the same be sold and the proceeds equally divided between complainant and re-
88 spondent; fourth, general relief; complainant verifying said bill and attaching thereto, as exhibit, a copy of a deed made May 3, 1854, and recorded May 8th, 1854, whereby, for six hundred dollars, John Carrie conveys the above-described lot of land to Elijah D. Robertson in trust for the sole use, behoof, and benefit of Fanny Gardner and their daughter, Frances Gardner, and any future issue of the said Fanny by the said Thomas, and in case of the death of the said Frances and Fanny in trust for the next of kin of the said Thomas.

Second. That respondent, styling herself Mary Frances Davis, formerly Frances Beatty, born Mary Frances Gardner, answered said bill, admitting the allegations thereof as to the relationship of Thomas Gardner, his purchase of the property, the making of the trust deed, and that Thomas, complainant, and respondent resided on said property from the time of said purchase to the death of

Thomas, which respondent averred took place in November 1865, and that complainant and respondent have continued to reside on said property since said death. Respondent denied that said property ever was divided by said Thomas or since his
89 death otherwise than that for convenience only. Said Thomas and complainant resided on one part of said lot and respondent, her husband, and numerous family on the other, and for the same reasons of convenience complainant and respondent have so resided since the death of said Thomas. Respondent denies all complainant's allegations as to the nature of the title whereby complainant and respondent enjoy the use of said property, and says that their title is an equitable one as *co-cestui que trusts.* for life, remainder over to respondent's children in life at the termination of said equitable life estate. Further answering by way of cross-bill, respondent shows that prior to January 1, 1863, no proceedings were ever instituted to escheat said property as being conveyed for the benefit of free persons of color; that by section 2627 of the Code of Georgia, as becoming of force on January 1, 1863, escheat was abolished in Georgia except upon failure of heirs; that by act of the General Assembly of Georgia of March 17, 1866, free persons of color were vested with all the property rights of white persons; that among these rights was one to a prescriptive title to realty by adverse possession thereof for seven years under
90 written evidence of title; that by possession adverse to the world under said trust deed for seven years and more prior to the bringing of complainant's bill complainant and respondent have a good prescriptive title to said property under and according to the limitations of said trust deed, and that complainant and respondent have an equitable life estate in common in said property, remainder in fee to the next of kin of said Thomas; that respondent has six children, Thomas Alexander Beatty, adult, and Sarah Alexina Beatty, minor, by her first husband, Alek Beatty, and four minor children, namely, James Richard Davis, William Henry Davis, Addie Viola Davis, and an unnamed babe, by her present husband, John A. Davis; that said children are the next of kin after respondent to said Thomas, the marriage of said Thomas and complainant being void of issue; that said Thomas ever meant and declared that said property was purchased for the joint use during life of complainant and respondent, remainder to his next of kin, and to effectuate said intent had said trust deed drawn.

Respondent prays that her said adult child be made a party respondent; that a guardian *ad litem* be appointed for her said
91 minor children, and that said guardian be also made a party respondent; that to effectuate the said beneficial intent of said Thomas and carry out said trust deed in all its parts the court decree the said trust to be a valid and subsisting trust and appoint a trustee to carry out the terms and uses thereof—that is to say, to hold said property in trust for the joint use and benefit of complainant and respondent during their lives or either of them, and in trust, further, at the termination of said lives to convey said property, under direction of court, to the next of kin of the said Thomas

then living—that is to say, to such of respondent's children as may be then living, and should there be none such, then to the next of kin to them to said Thomas; and for general relief.

Third. That at the April term, 1880, of said superior court the following order in said cause was had and taken, to wit:

FANNY GARDNER
vs.
FRANCES BEATTY. } Equity.

Counsel consenting, ordered, as prayed by respondent in
92 her cross-bill, that a guardian *ad litem* be appointed for the minors in said cross-bill mentioned, said guardian to be hereafter named, and that said guardian *ad litem* and the Thomas Alexander Beatty in said cross-bill mentioned be made parties respondent, and the cause proceed.

This April 29, 1880.

E. H. POTTLE,
Judge Sup'r Court, N. C.

Fourth. That at the April adjourned term, 1884, of said superior court, pursuant to said order of April 29, 1880, said Thomas Alexander Beatty came in as party respondent to complainant's bill, and being appointed guardian *ad litem* of said minors came in also as such guardian as party respondent to said bill.

Fifth. That at said April adjourned term, 1884, respondents, by leave of the court had, amended the answer and cross-bill aforesaid, showing that said Thomas died on the 23d of November, 1865; that complainant and respondent entered on the occupancy of said lot at the date of said trust deed and have been in such occupancy ever since, and entered upon and were in such occupancy under and by virtue of said deed only, said amend-
93 ment proceeding in the words following, to wit: "That under the laws of the State of Georgia, as the same existed from the date of said trust deed up to the present time, a deed or any other instrument in writing purporting to convey title to land, even if void and legally incapable in itself of conveying the title purported thereby to be conveyed, is good as color of title, and adverse possession of such land thereunder for seven years gives a good title, such as set out in the deed, by prescription to such land; that by and under the first section of the act of Congress of the United States of April 9, 1866, embodied in *actions* 1977 and 1978 of the Revised Statutes of the United States of America, all persons within the jurisdiction of the United States became, were, and are entitled to the equal benefit of all laws and proceedings for the security of person and property as enjoyed by white citizens, and all citizens of the United States became, were, and are entitled in every State to the same rights as are enjoyed by white citizens thereof as respects real and personal property; that by and under the first section of the fourteenth article of amendment to the Constitution of the

United States it is provided that no State shall make or en-
94 force any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; that under and by virtue of said act of Congress and said amendment as aforesaid respondents became, were, and are entitled to the same rights as to prescriptive title by possession under color of title as aforesaid as any white person; that under and by virtue of said act and said amendment the act of the General Assembly of the State of Georgia entitled 'An act supplementary to and more effectually to enforce an act entitled "An act prescribing the mode of manumitting slaves in this State," approved December 19, 1818,' an- the act of said General Assembly amendatory of said act of 1818 and entitled 'An act to amend the act of 1818,' approved December 22, 1819, cannot be lawfully enforced as against respondents' rights under said trust deed as color of title as aforesaid, even if said deed were originally void, which respond-
95 ents do not admit; that respondents, specially relying on said act of Congress and said XIV amendment, claim that under said trust deed and their said occupancy of said lot thereunder for seven years after Nov. 23, 1865, complainant and respondent have an equitable life estate in common in said lot, remainder in fee to next of kin of said Thomas."

Sixth. That at the April adjourned term, 1884, of said superior court, to wit, on the 26th, 27th, and 28th day- of June, 1884, said cause came on to be heard before the Honorable Edward H. Pottle, judge of the superior court of the northern circuit, presiding, and a jury, Messrs. Foster & Lamar, a law firm composed of H. Clay Foster, Esq., and Joseph R. Lamar, Esq., appearing as solicitors for complainant, Davenport Jackson, Esq., original counsel for complainant, having died pending the cause, and Salem Dutcher, Esq., and Thomas S. Bean, Esq., appearing for respondents.

Seventh. That on said trial, on the 27th day of June, 1884, complainant introduced the following witnesses, to wit, William C. Jones and Fanny Gardner, the complainant, and also intro-
96 duced the following documentary evidence, to wit: Trust deed of May 3, 1884, from John Carrie to Elijah D. Robertson; agreement of counsel that complainant had paid taxes to the city of Augusta on the portion of lot in question occupied by her for the years 1868, 1869, 1871, 1872, 1873, 1874, 1876, 1877, 1878, and 1879, and respondent had paid like taxes on the portion of lot occupied by her; receipt, signed E. Bustin, for city of Augusta taxes for 1861; agreement of counsel that respondent Frances, claiming that she and compl't had only life estate in the lot, remainder to Tom Gardner's next of kin, had objected to complainant selling as hers in fee simple the portion of the lot resided on by her; and respondents introduced the following witnesses, to wit, L. T. Blome, Edwin V. Sharp, Patrick Gould, and Francis Beatty (now Davis), respondent, and also introduced the following documentary evidence, to wit: Cook, marked "Sexton's

Book, Negroes," showing interment of Thomas Gardner, colored, on Nov. 24th, 1865; city of Augusta tax book for 1864, 1865, and 1866, showing return of lot in question in 1864 and 1865 in name of F. C. Barber for Gardner, colored, and in 1866 in name of T. E. Gardner and F. E. Gardner, as claimed
97 by respondents; minutes of Richmond superior court of Dec. 20th, 1856, being record of appointment of F. C. Barber as guardian for Fanny Gardner and Frances Gardner, free persons of color; agreement of counsel that F. C. Barber administered in 1866 on the estate of Thomas Gardner, colored, and made sworn inventory thereof; plat of Carrie land; tax *fi. fas.* of city of Augusta *vs.* complainant for 1880, 1881, and 1882; which witnesses testified, and which documentary evidence is, as set out in the brief of evidence on said trial, agreed to by counsel and approved July 18, 1884, as correct by said presiding judge, said brief of evidence being a part of the record of said cause accompanying this bill of exceptions, and by reference made a part hereof, respondents also offering in evidence on said trial and the court, on complainant's motion, ruling out the paper marked "A" in said brief of evidence and referred to as "paper A" in the testimony of said witness Sharp, as set out in said brief.

Eighth. That on the second day of said trial, complainant being introduced as a witness in her own behalf, and testifying, as
98 set out in said brief of evidence, that she had furnished out of her own means to said Thomas one-half of the purchase-money of said lot, and respondents objecting to the admission of such testimony on the ground of irrelevancy, there being no averment in the bill to that effect, the court, over objection of respondents that the same constituted a new cause of action, allowed complainant to amend her bill by inserting therein the words following, to wit: "And complainant further shows that one-half the purchase-money of said property was by her furnished to the said Thomas Gardner at the time of the purchase, said money being the proceeds of her labor as a free person of color."

Ninth. That on the third day of said trial the court, over objection of respondents that the same constituted a new cause of action, allowed complainant to amend her bill by adding thereto the words following, to wit:

"By leave of the court first had and obtained, complainant amends her bill and says that if this honorable court should hold that in division of said lot by the said Thomas Gardner, in which he
99 gave to your oratrix the portion on which she has since lived, that she acquired no legal interest therein and no interest that has or could ripen by prescription, then and in that event she says that the said Thomas Gardner, if his gift to your oratrix was to be counted as no gift, *that he* died in possession of all of said lot, leaving as his only heirs your oratrix and respondent, Frances Beatty; that the said heirs have by tacit consent actually occupied, held, and claimed the shares or portions so as aforesaid divided to them by said Gardner; that said Gardner made no will and left no other heirs."

Tenth. That the respondents on said trial moved to rule out so much of complainant's testimony as was to the effect she had furnished out of her own means to said Thomas, at the time of his purchase of said lot, one-half of the purchase-money thereof, basing said motion on the ground that, complainant being the wife of said Thomas at said time, any property brought into or earned or acquired during the coverture by her was the property of said Thomas as her husband, which motion the court overruled.

100 Eleventh. That after said witness Sharp had testified, as set out in said brief of evidence, touching the papers marked "A," the same having been so marked by order of the court to identify the same, and after said witness had identified said paper, respondents offered the same in evidence; whereupon, on motion of complainant and over objection of respondents, the court ruled out said paper "A."

Twelfth. That on said trial respondents in writing requested the court to give in charge to the jury six several requests, each and all whereof the court refused to so give, the said requests so asked and refused being as follows, to wit:

GARDNER *vs.* BEATTY *et als.*

Respondents request the court to charge—

1. The case made by the pleadings in this case is in brief as follows: The complainant, Fanny Gardner, prays that the portion of the lot on which she now resides be decreed to be hers absolutely. She says this should be done for two reasons: 1-, because she has a good prescriptive title in fee simple to that portion by twenty years' possession thereof; 2dly, because she contributed one-half

101 of the purchase-money of the whole lot; and, 3dly, that she has a good title as heir to Thomas Gardner. She says she wants to sell that portion of the lot to which she lays claim, but that resp'ts have prevented her from finding a purchaser by setting up that she has only a life estate in common with respondent, Frances Beatty, in the whole lot, under the trust deed of 1854. She says this deed is void because it conveys realty in Augusta, Ga., in trust for the benefit of free persons of color, contrary to the laws of Georgia.

The respondents deny that complainant has a fee-simple title to any part of the lot. They say that even if the deed of 1854 was void when made complainant and respondent, Frances Beatty, went into the occupancy of the lot under it; that they were in the occupancy of the lot under that deed on the 17th of March, 1866, when the laws of Georgia gave colored people the same property rights as white people; that they were in the occupancy of the lot under that deed on the 9th of April, 1866, when an act of Congress gave colored persons the same property rights in every State as white persons; that they remained continuously in possession of the

102 lot under that deed, as color of title, for seven years after the 17th of March, 1866, and the ninth of April, 1866; that under the laws of Georgia, as of force from long prior to 1866 up to

the present day, possession of realty under color of title for seven years gives those so holding a good prescriptive title, such as set out in the color of title to that property, and that even a void deed which in and of itself conveys no title is good as color of title on which to base such a prescription; that by holding under the deed of 1854 for seven years after March 17th, 1866, a good prescriptive title vested in both complainant and respondent, Frances Beatty, according to the terms of that deed; that this title is an equitable estate for life in complainant and Frances — as tenants in common, remainder over in fee to Thos. Gardner's next of kin. Respondents deny that complainant has any other title to the lot or any part thereof than the one just mentioned. Respondents, relying specially on the act of Congress of 9th of April, 1866, heretofore mentioned, and so much of the XIV amendment to the Constitution of the United States as declares that no State shall
103 make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, say that the acts of Georgia of 1818 and 1819 prohibiting free persons of color from having any legal or equitable title or interest in realty in the city of Augusta, in said State, cannot now be lawfully enforced against respondents so as to deny them in such proceeding the full and equal benefit since March 17th, 1866, and 9th April, 1866, of the laws of Georgia as to prescriptive title to realty by seven years' possession under written evidence or color of title, the same as if they were white persons. The issue is therefore as to the nature of complainant's title as respects this land.

2. If you find from the evidence in this case that Thomas Gardner bought this land for the joint use of Fanny and Frances during their lives and at their death to go to his next of kin, and had the deed of 1854 made to carry out this purpose, and that Frances and Fanny
104 entered on the occupancy of the land by virtue of the deed and were in the occupancy of the land under the deed at the time free persons of color became entitled to equal property rights under the law with white persons, and remained in such possession and occupancy for seven years thereafter, then I charge you that even if the deed itself were void they obtained a good prescriptive title such as set out in the deed—that is, a good prescriptive title to the joint use and enjoyment of the land during their lives. The fact that the deed was void or that Fanny or Frances were free persons of color in nowise prevents such a prescriptive title as stated accruing to them if the evidence shows the facts above stated.

3. Whenever two persons are from any cause entitled to the possession simultaneously of any property in this State they are tenants in common, and each entitled to the use and enjoyment of one-half of the common property, and are each liable for one-half of the burdens imposed by law on the common property, such as taxes. If, therefore, you find from the evidence in this case that Fanny and Frances became simultaneously entitled to the possession of this property they were tenants in common, equally entitled to its

benefits and equally liable for its burdens. If you find that one lived on one-half and one on the other, this is nothing more than the law entitled them to; and if one paid the taxes on her half and the other on hers, this is nothing but what the law required them to do. The fact of one living on one-half and the other on the other, or of one paying the taxes on one-half and the other the taxes on the other, no matter how long this was kept up, would not give either one a fee-simple title to the particular half on which she lived and paid taxes. At the end of half a century they would still be tenants in common, each having the right to possess the joint property and to use and enjoy *of* one-half of it. No tenant in common can set up an exclusive right by prescription against his cotenant in the whole or any part of the property unless he actually ousts his cotenant or expressly notifies his cotenant that he holds adversely to his rights, or unless he assumes exclusive possession of the whole property and refuses to admit his cotenant to his rightful participation after the cotenant demands such admission. If, therefore, you find that Frances and Fanny became simultaneously entitled to the use and enjoyment of this lot, they were tenants in common and are so still, unless you find that Fanny has taken some of the steps above mentioned against Frances, and follows it up with adverse possession for seven years under color of title or twenty years without it.

4. The next of kin to Tom Gardner, as the words are used in the deed of 1854, mean his nearest blood relations after his own child Frances. A man's nearest blood relations after his own children are his grandchildren. Tom Gardner's grandchildren are parties respondent to this bill. If Fanny and Frances are tenants in common for life in this land these grandchildren, should they outlive them, would be entitled to the land, share and share alike. Fanny claims that she has a fee-simple interest in a part of this land by possession thereof for twenty years, and consequently there is no remainder in this part for the next of kin. You cannot find that Fanny has a fee-simple interest in any part of this land by adverse possession for twenty years, unless you find that she has been in such possession of such part for the full period of twenty years from the time that free persons of color became vested in this State with the same property rights as white persons.

5. If you find that a good prescriptive title has arisen under this trust deed the effect is that Fanny and Frances will each be entitled for life to the use and enjoyment of one-half of the property, and at their death it goes to the next of kin of Thomas Gardner. If you find that Fanny has a fee-simple interest in that part of the lot whereon she now resides the next of kin of Thomas have no rights whatever therein. Fanny may dispose of it while living as she pleases, and if she dies intestate it would go to her next of kin.

6. If you find from the evidence that the complainant did not set up any claim to the property in dispute, by having furnished part of the purchase-money, until twenty years had expired from the time the purchase was made I charge you that she is now barred by

the statute of limitations from setting up title to the property for that reason.

SALEM DUTCHER,
THOS. S. BEAN,
Att'ys for the Respondents.

The above requests to charge are respectfully declined.
E. H. POTTLE, *Judge.*

108 Thirteenth. That the court, upon said trial, charged the jury a- follows, the same being said charge entire, to wit:

GENTLEMEN OF THE JURY: This is a proceeding in equity, instituted by Fanny Gardner, setting up a title to one-half of a certain lot of land in the city of Augusta. The bill recites that in 1854 one John Carrie made a deed to this lot to one Thomas Gardner in trust for the use and benefit of Fanny Gardner, the wife of Thomas, and Frances, his daughter, and at the death of his wife to his next of kin in life at that time. All sides admit that Thomas Gardner, his wife, and children were all free persons of color. The bill prays that the deed may be considered void and of no effect. It further states that Thomas Gardner bought the land with the money of his wife, and that Thomas Gardner died in November, 1865. Thomas Gardner died, and she claimed on the distinct ground of title that she and her daughter Frances are the only heirs-at-law of Thomas Gardner, and by inheritance they take the lot jointly between them, not for the lifetime of Fanny, but in fee-simple or absolutely, each being entitled to one-half of the lot. The bill moreover states
109 that the lot was divided between them, the line of separation being the fence. This is the case stated by the plaintiff.

On the other hand, the counsel for the def't allege in the answer admitting that the trust deed was originally void that under this deed Frances and her children took a title to the whole of the lot at the death of Fanny; that Frances has been in possession of one-half of the lot for more than seven years, and that she acquired what is called a title by prescription to it. In the opinion of the court the case turns mainly upon matters of law, and I charge you as follows:

Under the law in force at the time of making this deed free persons of color could not hold real estate, and the deed from Carrie to Gardner in trust was absolutely void, and the fact that the war and its results, as declared by the Constitution of the United States and the acts of our own Legislature, have put all colored persons on the same footing with white persons do- not and cannot make the laws invalid or validate any title acquired under them, and no continuance of possession for any number of years by the wife and
110 daughter under this void deed can ripen it into a good title. The transaction being illegal and void, no act of either and no post-war enactments can galvanize it into life.

If you believe that Thomas Gardner paid Carrie for this land, it being admitted that there were no proceedings before 1860 to escheat this property, and remained in possession of the land until after the close of the war and died in November, 1865, then, notwithstanding

the law which made a trust deed void and he died in possession of the land, the wife and daughter took this estate by inheritance absolutely, each being entitled to one-half. If the evidence does not show that, but shows that Thomas Gardner paid the purchase-money and went into possession and then divided the lot between Fanny and Frances, and that they both went into possession and remained in possession until after the war closed and are still in possession, Frances is estopped from denying the title of Fanny to the one-half now claimed by her. So that you see that my view of the law is that the trust deed cannot be enforced or be made the basis of any title. If, therefore, you find for the complainant Fanny, you
111 may appoint three discreet persons to make the division of the lot, providing for a sale in case no division of the kind can be made.

Fourteenth. That the jury found and returned a verdict finding complainant entitled in fee simple to that part of the land in question whereon she resided.

Fifteenth. That at the term whereat said trial was had and verdict rendered respondents made application for a new trial, and a consent order was had and taken in said cause allowing respondents thirty days after the adjournment of said term wherein to perfect and file their motion for new trial, and therewith a brief of the evidence in said cause under the revision of said judge presiding on said trial, and providing for the adjudication of said motion by said judge in vacation, with liberty of exception as in term time.

Sixteenth. That pursuant to said consent order and within the time limited thereby respondents duly filed, on the 21st day of July, 1884, a brief of the evidence in said cause, agreed to on July
112 16th, 1884, by said counsel, and approved on July 18th, 1884, by said presiding judge as correct, and also duly filed on said 21st of July their perfected motion for new trial, approved, save as to the third ground thereof, on July 18, 1884, by said presiding judge.

Seventeenth. That respondents moved for a new trial as aforesaid on the following grounds, to wit:

1st. Because the court allowed complainant to amend as set out in the eighth paragraph of this bill of exceptions.

2d. Because the court allowed complainant to amend as set out in the ninth paragraph of this bill of exceptions.

3d. Ground not certified by the court.

4th. Because the court ruled as set out in the tenth paragraph of this bill of exceptions.

5th. Because the court ruled as set out in the eleventh paragraph of this bill of exceptions.

6th. Because the court refused respondents' said first request.

7th. Because the court refused respondents' said second request.

8th. Because the court refused respondents' third request.

113 9th. Because the court refused respondents' said fourth request.

10th. Because the court refused respondents' said fifth request.

11th. Because the court refused respondents' said sixth request.

12th. Because the court charged as follows, to wit:

"The counsel for the defendants allege in the answer admitting that the trust deed was originally void that under this deed Frances and her children take a title to the whole lot at the death of Fanny; that Frances has been in possesssion of one half of the lot for more than seven years, and that she acquired what is called a title by prescription to it."

13th. Because the court charged as follows, to wit:

"I charge you as follows: Under the law in force at the time of making this deed free persons of color could not hold real estate, and the deed from Carrie to Gardner in trust was absolutely void, and the fact that the war and its results as declared by the Constitution of the United States and the acts of Congress and the acts of our own Legislature have put all colored persons upon the
114 same footing as white persons do not and cannot make these laws invalid or validate any titles acquired under them, and no continuance of possession for any number of years by the wife and daughter under this void deed can ripen into a good title. The transaction being illegal and void, no act of either and no post-war enactments can galvanize it into life."

14th. Because the court charged as follows, to wit:

"If you believe Thomas Gardner paid Carrie for this land, it being admitted that there were no proceedings before 1860 to escheat this property, and remained in possession of the land until after the close of the war and died in November, 1865, then notwithstanding the laws which made the trust deed void, and died in possession of the land, the wife and daughter took this estate by inheritance and absolutely, each being entitled to one-half. If the evidence does not show that, but shows that Thomas Gardner paid the purchase-money and went into possession, and then divided the lot between Fanny and Frances, and that they both went into possession and remained in possession until after the war closed,
115 and are still in possession, Frances is estopped from denying the title to Fanny to her one-half, now claimed by her. So you see that my view of the law is that the trust deed cannot be enforced to be made the basis of any title."

Eighteenth. That by agreement of counsel, in writing, on July 16, 1884, it was agreed that said motion for new trial should be submitted to Hon. Edward H. Pottle, the judge presiding at the trial, without argument, for his decision thereon.

Nineteenth. That on the twenty-fifth day of July, 1884, said presiding judge overruled said motion for a new trial in and by the order and judgment following, to wit:

FANNY GARDNER *vs.* FRANCES BEATTY *et al.* } Equity. In Richmond Superior Court, and Motion for New Trial.

After considering this motion, it is ordered that the motion for new trial be overruled. The clerk of Richmond superior court is ordered to enter this judgment on the minutes of the court.

July 25, 1884.

E. H. POTTLE,
Judge Sup'r Court, N. C.

116 And now, on this the twenty-eighth day of July, 1884, being within thirty — after the rendition of said judgment overruling said motion for a new trial, come respondents, and, excepting to said judgment overruling said motion for new trial and assigning said judgment overruling said motion for a new trial as error, tender this their bill of exceptions, and pray that the same be signed and certified according to law.

SALEM DUTCHER,
THOS. S. BEAN,
Solicitors for Respondents.

I do certify that the foregoing bill of exceptions is true and contains all the evidence material to a clear understanding of the errors complained of, and the clerk of the superior court of the county of Richmond is hereby required and ordered to make out a complete copy of the record of said case and certify the same as such, and cause the same to be transmitted to the September term, 1884, of the supreme court, that the errors alleged to have been committed may be considered and corrected.

July 29, 1884.

E. H. POTTLE,
Judge Sup. Court, N. C.

117 STATE OF GEORGIA, }
Richmond County. }

I, William E. Keener, clerk of the superior court of the county and State aforesaid, hereby certify the foregoing to be the true and original bill of exceptions just as received from the judge and filed by the respondents in my office, August 2d, 1884, in the case of Fanny Gardner *vs.* Frances Beatty *et al.*, and I now transmit the same with a transcript of the record, pursuant to the judge's order in the said case, in conformity to law.

Witness my official signature and seal of said court this 11th day of August, 1884.

WILLIAM E. KENEER,
Clerk Superior Court, Richmond County, Georgia.

118 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
ATLANTA, GA., *Oct.* 7, 1881.

I hereby certify that this and the pages hereto attached contain a true copy of the original bill of exceptions in the case therein stated and now of file in this office.

Witness my signature and the seal of the supreme court of Georgia, hereto affixed the day and year above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON,
Cl'k S. C. Ga.

[Endorsed:] Gardner *vs.* Beatty *et al.* Bill of exceptions. Service of a copy of the within bill of exceptions acknowledged this July 29, 1884. Foster & Lamar, solicitors for complainants. Filed in office Aug. 2, '84. Wm. E. Keener, cl'k. Filed in office Aug. 12, '84. Z. D. Harrison, C. S. C. Ga.

119 *Opinion.*

Supreme Court of Georgia. Sept. Term, 1884.

BEATTY *et al.*
vs.
BENTON, Executrix.

By the court—JACKSON, *C. J.:*

This is a bill filed by Fanny Gardner against Frances Beatty and children to settle her title to one half of a lot in Augusta occupied by her while Frances occupied the other half. The lot was bought by Thomas Gardner, deceased, in 1854, and one half the purchase-money was paid by him and the other half by compl't, who was his wife. Frances, the defendant, was the daughter by a former wife of deceased and married Beatty afterwards. Up to that time the lot was one, only one house being on it. Then it became crowded and was divided and a house built for Beatty and wife, who occupied it ever since. All the parties were free persons of color before the war. When the purchase was made, in 1854, a deed was taken to the property in the name of Robertson, trustee, a white person, to the use of Fanny and Frances for life, and then to the next of kin of Thomas Gardner. If that trust deed was valid when made the compl't only had a life estate, and, having died and left a will
120 since this writ of error was brought, she and her testatrix now can take nothing; so that the verdict and decree, being that she shall keep the half set apart to her in the division and so long in her possession, is wrong if that trust deed be operative.

1. Under the decision of this court in Swoll *et al. vs.* Oliver *et al.*, 61 Ga., 248, that deed, as the law of Georgia stood in 1854, was void. So in the Planters' Loan & Savings Bank *vs.* Johnson *et al.*, 70 Ga., 302 (an Augusta case), the same point is decided emphatically, based on the act of 1818. Cobb's Dig., p. 993. Therefore the trust deed is out of the way.

2. When the law freed slaves in Georgia and put free persons of color, as to real property, on the same footing as whites, this lot, as divided, was in possession of these two colored women, a moiety with a house on it erected by the husband & father, in possession of each. The primary element of title, possession, being thus in each, and the State never having escheated the property whilst the old law stood, this possession is good against the claim of all others, & the verdict and decree giving each her several share is right.

3. The decree is all the more equitable because complainant paid

one-half of the purchase-money. Cases of this sort, under
121 the anomalous condition of such property remaining in the possession of a class of persons who could not formerly hold title thereto, should be adjudicated under broad views of natural equity.

There is nothing in the minor points made by the able and indefatigable counsel for pl'ffs in error which can unsettle the result which the above principles necessitate, we think, as the law of this case.

Judgment affirmed.

122 SUPREME COURT OF THE STATE OF GEORGIA,
ATLANTA, GA., *Jan'y* 6, 1885.

The honorable the supreme court met pursuant to adjournment.

Present: Their honors James Jackson, chief justice; Samuel Hall & M. H. Blandford, associate justices.

FRANCES BEATTY *et al.*, Pl'ffs in Error,
vs.
GEORGIA BENTON, Ex'tr'x, Def't in Error.

This case came before the court upon a transcript of the record from the superior court of Richmond county, and, after argument had, it is considered and adjudged by the court that the judgment of the court below be affirmed.

123 CLERK'S OFFICE, SUPREME COURT OF GEORGIA
ATLANTA, GA., *Dec.* 22*d*, 1886.

I, Z. D. Harrison, clerk of the supreme court of the State of Georgia, do hereby certify that the foregoing pages hereto attached contain the original writ of error to the Supreme Court of the United States in the case therein stated, with original citation & copy bond in said case, together with true copies of the transcript of record and of the bill of exceptions and of the judgment and opinion of the supreme court of the State of Georgia in said case, as appears from the records & files of this office.

Witness my signature and the seal of said court, hereto affixed the day & year above written.

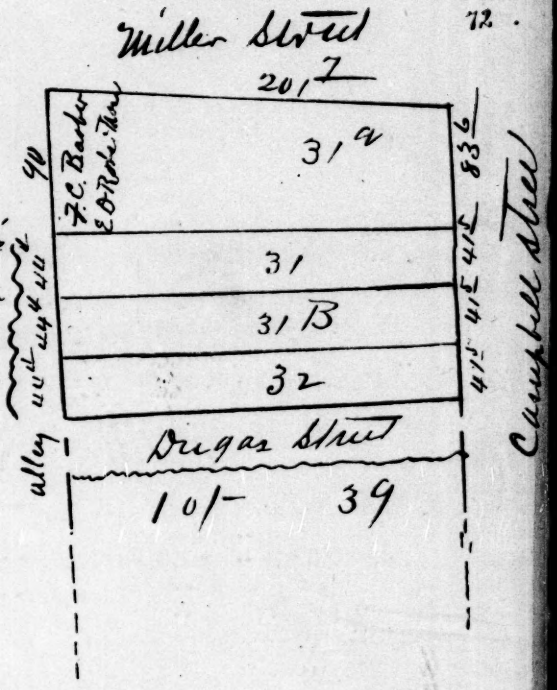
[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON,
Cl'k S. C. Ga.

Endorsed on cover: Georgia supreme court. No. 279. Frances Beatty, Thomas Alexander Beatty, & Thomas Alexander Beatty, guardian *ad litem* of Sarah Alexina Beatty, James Richard Davis, William Henry Davis, Addie Viola Davis, and —— Davis, minors, plaintiffs in error, *vs.* Georgia Benton, executrix of Fanny Gardner, deceased. Filed December 27, 1886.

From Phillips plan of Augusta 1855

Dimensions, designations Barber-Robertson taken from copy of original plat



No. 249.
Beatty et al
vs.
Benton, Exrs.

p. 72.

Supreme Court, U.S.
FILED,
MAR 10 1890
JAMES H. McKENNEY,

Supreme Court of the United States.

October Term, 1889.

No. 279.

FRANCES BEATTY, THOMAS ALEXANDER BEATTY, AND THOMAS ALEXANDER BEATTY, Guardian ad litem of SARAH ALEXINA BEATTY, JAMES RICHARD DAVIS, WILLIAM HENRY DAVIS, ADDIE VIOLA DAVIS, and ——— DAVIS, Minors,

PLAINTIFFS IN ERROR,

vs.

GEORGIA BENTON, Executrix of FANNY GARDNER, Deceased.

BRIEF OF

SALEM DUTCHER

For Plaintiffs in Error.

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Supreme Court of the United States.

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I. STATEMENT OF CASE.

II. ASSIGNMENT OF ERROR.

III. ARGUMENT AND BRIEF FOR PLAINTIFFS IN ERROR.

[References to Transcript are to original paging.]

I. STATEMENT OF CASE.

In 1854 one Carrie conveyed a certain lot of land in the City of Augusta, Georgia, to one Robertson, in trust for Fanny, the wife, and Frances, the daughter, by a former wife, of Thomas Gardner, (and any issue of said Fanny by said Thomas), remainder, on the death of said Fanny and Frances, to the next of kin of said Thomas, which deed was recorded immediately on its execution (Transcript, 17–18).

On the execution of the deed, Fanny and Frances took up

their abode on the land, and continued to reside there till 1879 (Trans. 12, 21, 26), Thomas living with them till his death in 1865 (Trans. 12, 22, 26, 59, 65), without issue by Fanny (Trans. 24, 21).

Thomas, Fanny, and Frances were all free persons of color (Trans. 10, 26, 108), and at the time of the execution of the deed, and up to the year 1866, there was in force a certain Georgia statute passed in 1818, which provided as follows:

"SEC. VIII. No free person of color within this State (Indians in amity with this State excepted) shall be permitted to purchase or acquire any real estate, or any slave or slaves, either by a direct conveyance to such free person of color of the legal title of such real estate, or slave or slaves, or by a conveyance to any white person or persons of such legal title, reserving to such free person of color the beneficial interest therein, by any trust, either written or parol, by any will, testament, or deed, or by any contract, agreement or stipulation, either written or parol, and securing, or attempting to secure to such free person of color the legal title or equitable or beneficial interest therein, but all and singular such real estate, and each and every such slave or slaves shall be deemed and held to be wholly forfeited, and the escheators in the several counties in this State shall be, and they are hereby, required to proceed against such property in the manner pointed out by the several Acts to regulate escheats in this State; and the proceeds of such forfeited property shall, after deducting ten per centum on the gross amount thereof, which shall be paid to the person giving information of the same to the escheator, or to the escheator himself, if he shall discover the same, and the costs of the inquisition, be appropriated," half to the County and half to the State.—Cobb's Digest of Georgia Laws, p. 993;

—which Act was, in 1819, amended as follows:

"SEC. III. The eighth section of the Act aforesaid be and the same is hereby repealed, so far as relates to real estate, except in the cities of Savannah, Augusta, and Darien"—Cobb's Dig., p. 995.

The escheat laws mentioned in the act of 1818 will be found in Cobb's Dig., pp., 249–254, and will be hereinafter more fully cited, it being sufficient here to say that they provide in the usual form, for information, trial, verdict, and decree that the

supposed escheated property had "escheated to, and vested in, the State."

No proceedings were ever instituted to escheat this particular property (Trans. 23, 40); and, on March 17, 1866, Georgia enacted this statute (Georgia Laws, 1865–6, p. 239);

"*An Act to define the term 'persons of color,' and to declare the rights of such persons.*

SEC. I. *The General Assembly of the State of Georgia do enact*, That all negroes, mulattoes, mestizoes, and their descendants, having one-eighth negro, or African, blood in their veins, shall be known in this State as 'persons of color.'

SEC. II. That persons of color shall have the right to make, and enforce, contracts; to sue; be sued; to be parties, and give evidence; to inherit; to purchase, lease, sell, hold, and convey real and personal property; and to have full and equal benefit of all laws and proceedings for the security of person and estate, and shall not be subjected to any other or different punishment, pain or penalty for the commission of any act or offence than such as are prescribed for white persons committing like acts or offences.

SEC. III. That all laws and parts of laws in relation to slaves, and free persons of color, militating against this Act be and the same are hereby repealed.

Approved March 17th, 1866."

On July 21, 1868, the Constitution of the United States was amended as follows: (15 Stats., App. xii, xiii)—

ARTICLE XIV.

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

By Act approved May 31, 1870, Congress enacted as follows (16 Stats., 144):—

"SEC. 16. That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in

the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

SEC. 18. That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted.

—said Act of April 9, 1866, providing in the first section thereof as follows (14 Stats., 27):—

"That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory of the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding,"

—which provisions of said Acts are embodied, in brief, in sections 1977 and 1978 of the Revised Statutes of the United States.

In 1879 said Fanny brought bill against said Frances to have said deed of 1854 cancelled, and that portion of said land whereon complainant resided decreed complainant's in fee simple (Trans. 14). The bill states that the land was purchased by Thomas Gardner, "and that the deed, at the special instance and request of the said Thomas, was made to Elijah D. Robertson in trust for the use, benefit, and behoof of the said Fanny and Frances, as provided by the terms of said deed" (Trans. 11), and that complainant and Frances occupied the land from execution of the deed up to the filing of the bill (Trans. 12);

but sets up that neither Robertson, nor any other, accepted the trust (Trans. 11); that, prior to the war, Thomas divided the land between complainant and Frances (Trans. 12); that the deed was void by reason of its repugnancy to the Georgia statute of 1818; and that, by adverse possession, for twenty years, of the portion set apart to her as aforesaid complainant had acquired title thereto (id). The copy deed annexed to the bill shows the same to have been attested and delivered, and recorded contemporaneously with its execution (Trans. 18).

At the trial, which occurred in 1884 (Trans. 95), complainant amended her bill by averring that she had contributed half of the purchase money of the land, and that Thomas died seized thereof, and intestate, leaving complainant and Frances his sole heirs, whereby complainant acquired title to a moiety thereof (Trans. 98, 99, 21).

Respondent Frances prayed in her six children (as next of kin to their grandfather Thomas, and prospective remaindermen) as co-respondents (Trans. 24), and it was so ordered (Trans. 30).

The answers admitted the purchase of the property by Thomas, the execution of the deed, that the beneficiaries thereunder were all free persons of color, and that complainant and respondent Frances had resided on the land continuously from the execution of the deed to institution of suit. It denied that the land had ever been divided as charged, and averred that complainant and respondent Frances only resided in different houses because, the original homestead becoming insufficient, Thomas had removed his daughter and her husband and numerous family to another house on the same premises (Trans. 22).

Further answering, by way of cross bill, respondents, relying on the XIV. amendment and the Acts of Congress embodied in sections 1977 and 1978 of the Revised Statutes, denied that the trust deed was void, and insisted that, by virtue of said Amendment and Acts, said deed had enured to the estate therein limited, namely, an equitable life estate in common to complainant and respondent Frances, remainder in fee to Thomas Gardner's next of kin. Further, they contended that, even if

said deed were void, a void deed, under the laws of Georgia, as of force from March 17, 1866 up to time of answer, was good as color of title on which to base prescription by seven years possession; that, on becoming vested with the property rights of white persons, persons of color had acquired this right of prescription; and that, by possession of the property in question under the trust deed, as color of title, for seven years prior to filing of the bill, complainant and respondent Frances had acquired the title in said deed limited, namely, an equitable estate for life in common, remainder to Thomas Gardner's next of kin. Relying on said amendment and Acts, respondents contended that the Statute of Georgia of 1818 could not be lawfully enforced to deny them the rights so set up under said trust deed, and under said occupancy thereunder (Trans. 23, 26-28), and prayed that the trust, in the deed limited, be decreed a valid, subsisting trust. (Trans. 25.)

[The evidence offered and introduced upon the trial, it is not material at this point to consider, the Court below holding that the decree in favor of complainant was error if the deed of 1854 were operative, and sustaining the decree upon the ground that said deed was void (Trans. 120)].

Instructions embodying the above stated contentions of respondents were submitted to the Court (Trans. 31-34), which declined to give them in charge (Trans. 38), and to the contrary thereof, charged as follows:

"Under the law in force at the time of making this deed, free persons of color could not hold real estate; and the deed from Carrie to Gardner [Robertson] in trust was absolutely void, and the fact that the war and its results as declared by the Constitution of the United States and the Acts of Congress and the Acts of our own Legislature have put all colored persons upon the same footing with white persons do not, and cannot, make these laws invalid, or validate any title acquired under them, and no continuance of possession for any number of years by the wife and daughter under this void deed can ripen it into a good title. The transaction being illegal and void, no Act of either and no post war enactment can galvanize it into life." (Trans, 110)

—and again

"my view of the law is that the trust deed cannot be enforced or be made the basis of any title"—(Trans. 111).

The jury found for complainant "the exclusive right and fee simple title to that portion of said property now occupied by her" (Trans. 40).

Plaintiffs in error moved for a new trial, on the ground, *inter alia*, of the refusal to charge and charge, *ut sup.* (Trans. 54–55); which motion was refused (Trans. 74); and that judgment affirmed by the Supreme Court of Georgia) Trans. 119–122).

The Court based its affirmance on the invalidity of the trust deed, saying: "the decree * * * * is wrong if that trust deed be operative" (Trans. 120).

II. ASSIGNMENT OF ERROR.

We respectfully submit that the Court below erred:

1. In deciding that there was no error in this charge:

"Under the law in force at the time of making this deed, free persons of color could not hold real estate; and the deed from Carrie to Gardner [Robertson] in trust was absolutely void, and the fact that the war and its results as declared by the Constitution of the United States and the Acts of Congress and the Acts of our own Legislature have put all colored persons upon the same footing with white persons do not, and cannot, make these laws invalid, or validate any title acquired under them * * * The transaction being illegal and void, no Act of either and no post-war enactments can galvanize it into life" (Trans. 110).

And—

2. In deciding that there was no error in this charge:

"No continuance of possession for any number of years by the wife and daughter under this void deed can ripen it into a good title * * * * * * * my view of the law is that the trust deed cannot be enforced or be made the basis of any title" (Trans. 110, 111).

III. BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

I.

As to the charge:

"Under the law in force at the time of making this deed, free persons of color could not hold real estate; and the deed from Carrie to Gardner [Robertson] in trust was absolutely void, and the fact that the war and its results as declared by the Constitution of the United States and the Acts of Congress and the Acts of our own Legislature have put all colored persons upon the same footing with white persons do not, and cannot, make these laws invalid, or validate any title acquired under them. * * * The transaction being illegal and void, no Act of either and no post-war enactment can galvanize it into life" (Trans. 110).

The Georgia Statute of 1818 (Cobb's Dig. 993) says:

"No free person of color * * * * * * shall be permitted to purchase or acquire any real estate * * * * * * either by a direct conveyance to such free person of color of the legal title * * * * * * or by a conveyance to any white person or persons of such legal title, reserving to such free person of color the beneficial interest * * * * * * but all and singular such real estate * * * * * * shall be deemed and held to be wholly forfeited, and the escheators * * * * * * are hereby required to proceed against such property in the manner pointed out by the several acts to regulate escheats in this State; and the proceeds of such forfeited property shall after deducting * * * * * * the costs of the inquisition, be appropriated," half to the County and half to the State.

The escheat Acts of 1801 (Cobb's Dig. 249-252) and 1817 (Id. 254), provided the following manner of procedure:

"—it shall be the duty of the escheator * * * to make a just and true statement of all the property * * * * * and notify the same to the Judge of the Superior Court * * * * * the Judge presiding at such Court shall cause the jury (being first sworn) to proceed and make a true inquest of all such supposed escheated property, both real and personal, which by the escheator shall be submitted to their investigation, and a true verdict make thereon" (id. 250);

"—if any suit for property supposed to be escheated, shall

be prosecuted by any escheator, and the jury before whom such trial shall be had, shall think there is no probable cause, the Court before whom the same shall be tried, shall award to the party aggrieved, his, her, or their reasonable and legal costs"—(Id. 251);

(if the verdict were for the escheator)—"the Judge * * * shall certify the same * * * * * to the escheator * * who is * * to record the same * * * * * and shall return the original into the office of the Clerk of the said Superior Court, to be there filed and kept as a record of said Court; and * * * * * * on returning the inquest * * * * the Clerk shall thereupon cause to be advertised * * * * for six months, a particular description of the property, both real and personal, so escheated * * * * * and requiring * * * * * who may claim * * * * * to appear * * * and if no person shall appear * * * * * within twelve months after * * * * * the Clerk of the said Court shall issue process, to be signed by one of the Judges, to the escheator, pronouncing the said property, both real and personal, to be escheated to, and vested in, this State, and directing him forthwith to sell and convey the same" (Id. 250).

The procedure, therefore, was, in brief, this: the escheator was to lodge an information with the Judge of the Superior Court (Cobb's Dig., 250); whereupon a jury was to be called, and, being sworn to true inquest make, (Id. 254), was to proceed and make a true inquest of all supposed escheated property submitted them (Id. 250). If the jury found no escheat, the party aggrieved was to have judgment for costs (Id. 251); but, if the verdict was of escheat, the inquest was to be entered of record, and advertisement thereof made for six months (Id. 250); and if, at the end of twelve months thereafter, no claimant appeared, the Judge was to pronounce the property "escheated to, and vested in, the State" (Id).

It thus appears that where land in Augusta was conveyed to, or for the use of, free persons of color, such land did not, by the terms of the Act of 1818, become forfeit to the State until such forfeiture had been regularly found by a jury, and a judgment had been entered up on such finding that the property had escheated to, and vested in, the State.

Prior to such judgment, we say the title was in the grantee.

A deed to an incapable grantee is good to pass the title out of the grantor into the grantee, subject, always, to be divested out of the grantee, by escheat, on office found, into the sovereign; but, until the sovereign so act, the title abides in the grantee.

This Court has repeatedly held that an alien may take by purchase and hold against all but the sovereign, and even against him till office found; and that this is so whether the conveyance be to the alien—

Fairfax vs. Hunter, 7 Cr. 603, 619–621;
Craig vs. Bradford, 3 Wh. 594;
Orr vs. Hodgson, 4 Wh. 453;
Gouverneur vs. Roberts, 11 Wh. 332, 356;
Taylor vs. Benham, 5 H. 233;
Jones vs. McMaster, 20 H. 8;
Phillips vs. Moore, 100 U. S. 208;
Hanrick vs. Patrick, 119 U. S. 156, 169;

Or to one in trust for him:

Cross vs. De Valle, 1 Wall. 5;
Osterman vs. Baldwin, 6 Wall. 116.

We cite also:

Goodrich vs. Russell, 42 N. Y. 181;
Escheator vs. Smith, 4 McCord (Law) 452;
Elmendorf vs. Carmichael, 3 Littell (Ky.) 472;
Merle vs. Matthews, 26 Cal. 456;
Sheaffe vs. O'Neil, 1 Mass. 256.

—but, not to multiply cases, adopt the language of this Court in Gouverneur vs. Robertson, 11 Wh. 356: "That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary."

The common law, whence the rule comes, that an incapable grantee can hold till office found, does not limit the same to cases of alienage, but extends it to all causes of forfeiture.

"By this Act [1 Westm. c. 24] no seizure can be made of lands or tenements into the King's hands before office found"—2 Inst. 206;

"Before office lands or tenements cannot be seized into the King's hands, and so is the common experience at this day"—Id. 573.

"Where an estate is forfeited by attainder, none can sue by petition before office found, for, till office, the estate is not vested in the King."

Bac. Abr., Prerog. E. 108.

A. was attaint of treason, the act of attainder declaring all his lands, etc., forfeit to the Crown, but the judges said "the common law will never adjudge the freehold, in deed or in law, of any land to be in the King till office found;" and, again, "the word *forfeit* did not vest the possession in the King, nor give him any entry without office first found;" and, no office being shown, adjudged against the King.

Nichols vs. Nichols, Plowd. 485, a.

In Griffiths vs. Pritchard, 5 Barn & Ad. 765, the question was whether ejectment would lie on the demise of a felon convict, where no office had been found, and the Court of King's Bench was unanimous that it would, saying "No office has been found, and therefore the Crown is not entitled."

"Though the goods of a *felo de se* are forfeit, nothing is vested in the King until the inquisition is found."

1 Sid. 150.

"No goods be forfeited, until it be lawfully found by the oath of twelve men that he is *felo de se*."

3 Inst. 54.

The Courts of Georgia have uniformly ruled the same general principle.

In Carnochan vs. Abrams, T. U. P. Charlton's Reps. 314, A. applied for administration on the estate of B. The escheator

notified the Court that B. died intestate and without heirs. Charlton, J., said: "The principle of escheat, if it applies, does not under the Act of 1801, impair the right to the administration until the jury make the inquest, and return the verdict on the report submitted to them by the escheator and the judge. In the meantime, the supposed escheated property remains in the possession of those whose rights are ostensibly perfect, and can only be divested by the verdict of a jury."

In Smith vs. Gentry, 16 Ga. 31, A. died intestate, without heirs or creditors, leaving land. B., as A.'s administrator, sought to eject C., who was in possession without title. Held, that there being neither heirs nor creditors, the administration was nugatory, and none could recover against C. but the escheator.

In Vickery vs. Benson, 26 Ga. 590, held that neither at common law, nor under the Georgia Act of 1801, was there any escheat till office found.

In Gresham vs. Rickenbacher, 28 Ga. 227, one S., a bastard, died intestate and without lawful heirs, and Gresham, the escheator, instituted proceedings to escheat his estate. Pending the inquisition, the Legislature remitted any rights the State might have in the premises to the dead man's relatives, the validity of which Act the escheator contested. The Court upheld the Act, saying: "the right of the State is not established until after inquest and office found;" and, "the Legislature may, while its right remains uncertain, doubtful, and unsettled, relinquish that right"—id. 232.

In Sutton vs. McLeod, 29 Ga. 589, the State had in 1795 granted certain land to P., and in 1845 granted the same land to K. Held, that K. must show that the title had gotten back into the State by escheat or reverter before he could maintain ejectment on his grant.

And in Moore vs. Ulm, 34 Ga. 569, held that title does not vest in the State till escheat.

Upon the foregoing principles we submit that the deed of 1854 was not void, but voidable only, and that upon its execu-

tion the title passed out of Carrie into Robertson, trustee, subject to be divested out of the trustee into the State, on office found.

No proceedings having ever been instituted to escheat this property; and the XIV Amendment and Act of Congress of 1870 (16 Stats. 144, secs. 16, 18; U. S. Rev. Stats, 1977, 1978) having made the *cestui que trusts* citizens of Georgia and of the United States, and conferred upon them an equality of property right with the white citizens of Georgia, we say that the deed thereby became a good and perfect deed to the uses therein limited.

The analogy, in this particular, between the case at bar and Gouverneur vs. Robertson, 11 Wh. 332, is perfect. In that case, one Brantz, an alien, obtained a land grant from Virginia in October, 1784, and in November, 1784, became a citizen of Maryland, and thereby, under the Articles of Confederation, a citizen of Virginia also. In 1785, Virginia granted the same land to one Rose, and in a contest between the senior and the junior grant, the defendants prayed this instruction: "That if the jury find that Brantz was an alien at the time when the patent given in evidence was procured by him, nothing passed to him by the said patent, but that it was void" (id 350).

The case was certified, and this Court said: "The question is, whether a patent for land to an alien be not an absolute nullity?" On this it ruled that such a grant was not a nullity, either under the common law or the law of Virginia (id. 351), though that law exposed such patents to escheat (id. 358). It said: "That an alien can take by deed and can hold till office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary" (id. 356). Still further, it laid down that, even if the grant were void, by reason of the grantee's incapacity at the time of issual, his subsequent naturalization related back so as to validate the same; adding that, "on this subject of relation the authorities are so ancient, so uniform, so universal, that nothing can raise a doubt that it has a material bearing on this case, but the question whether naturalization in Maryland

is equivalent to naturalization in Kentucky. To this the Articles of Confederation furnish an affirmative answer." (id. 351.)

The principle thus enunciated, that an alien takes a defeasible title, which, on removal of the disability, becomes perfect, has been ruled in a number of other cases, both as to grant and devise.

In Fairfax vs. Hunter, 7 Cr. 603, F. devised certain lands in Virginia to D., a British alien. Virginia did not escheat, and held that, under the treaty of 1794, which put such aliens on the property footing of citizens, the defeasible title became perfect.

In Craig vs. Bradford, 3 Wh. 594, Virginia granted land to S., an alien; and subsequently granted the same land to B., a citizen. The junior grantee set up that the senior grant was void, as to an alien, but held it was voidable only, and, there having been no escheat, the treaty of 1794 made the same perfect.

In Osterman vs. Baldwin,. 6 Wall. 116, the Constitution of Texas, while a part of Mexico, forbade aliens to hold land, and B., a citizen of the United States, having land there, conveyed the same to a citizen of Texas in trust for him. Held, that the admission of Texas confirmed B.'s title, his status then being that of a naturalized citizen, and there having been no office found while he was an alien.

In Hanrick vs. Patrick, 119 U. S. 156, the case was: in 1865 certain British aliens held land in Texas, subject to escheat, the laws of that State providing that aliens should only have such right as to realty as the alien's country gave Texans, and England not then allowing aliens to hold land. In 1870 an Act of Parliament was passed so doing, and held that the alien's defeasible title thereby became perfect.

Such for centuries has been the law.

"Alien naturalized," says Coke, "to all intents and purposes is as a natural born subject"—Co. Litt. 129, a; and

"If he be naturalized then he is not accounted in law *alienigena*, but *indigena*"—Id. 8, a.

"By this an alien is put in exactly the same state as if he had been born in the King's ligeance"—1 Bla. Com. 374.

A., an elder son, was naturalized and died without issue; held, without argument his younger brother, a subject-born, should inherit, for that A. "shall be adjudged as a natural-born subject."
Godfrey vs. Dixon, Cro. Jac. 539.

Well, therefore, might this Court say in Gouverneur vs. Robertson, 11 Wh. 351, that on this subject of relation, the authorities are ancient, uniform, and universal.

Now, if a removal of the disability of alienage by reason of a statutory naturalization, or by treaty, or by the accession of new territory, relates back so as to make a title, defeasible by reason of such disability, indefeasible and perfect, why does not the removal of the disability of color work a like confirmation?

It is beyond all question, that the XIV Amendment "gave citizenship and the privileges of citizenship to persons of color" —Strauder vs. West Virginia, 100 U. S. 305; and "was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons"— id. 306; Slaughter House Cases, 16 Wall. 37: and that "the plain object of these statutes [secs. 1977, 1978 U. S. Rev. Stats.], as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites" —Virginia vs. Rives, 100 U. S. 318.

We submit, therefore, that the trust deed of 1854 was not void, but voidable only, and that, never having been avoided, the Amendment and Acts relied on validated the same.

II.

We contended below: (Trans. 23, 26 28):

That by the laws of Georgia, as of force at the time free persons of color became vested with the property rights of white persons, and thence up to the time of trial, possession of lands, for seven years consecutively, under color of title, gave good title, such as expressed in the color, by prescription;

That a void deed was good color of title on which to base such prescription; and

That, by possession of the property in question, under the deed of 1854 (if void), as color of title, for seven years prior to the filing of the bill, there had enured to complainant and respondent Frances the estate in the deed limited, namely, an equitable life estate in common, remainder to the next of kin of Thomas Gardner.

We submitted to the Court below, a request or instruction embodying this contention as follows:

"If you find from the evidence in this case that Thomas Gardner bought this land for the joint use of Fanny and Frances during their lives, and at their death to go to his next of kin, and had the deed of 1854 made to carry out this purpose, and that Frances and Fanny entered on the occupancy of the land by virtue of the deed, and were in the occupancy of the land under the deed at the time free persons of color became entitled to equal property rights under the law with white persons, and remained in such possession and occupancy for seven years thereafter, then I charge you that even if the deed itself were void, they obtained a good prescriptive title such as set out in the deed, that is a good prescriptive title to the joint use and enjoyment of the land during their lives. The fact that the deed was void, or that Fanny and Frances were free persons of color in no wise prevents such a prescriptive title as stated accruing to them, if the evidence shows the facts above stated."—(Trans. 104).

The Court declined so to charge (Trans. 107), and to the contrary thereof, instructed the jury as follows:

"—no continuance of possession for any number of years by the wife and daughter under this void deed can ripen it into a good title (Trans. 110) * * * * my view of the law is that

the trust deed cannot be enforced or be made the basis of any title." (Trans. 111).

Not denying but that the general rule of law in Georgia is that a void deed is color of title, the Court held that "*this* void deed" could not be so relied on. In other words, it declared that deeds void by reason of repugnancy to the Georgia statute of 1818 were not within the purview and protection of the general rule.

Specially relying on the XIV Amendment and the Acts of Congress hereinbefore set out, we contended that the Georgia statute of 1818 could not be enforced to deny us the equal protection of the above stated rule of law (Trans. 28, 103), and the decision was against us.

It, therefore, remains to see, *first*, if the law of Georgia is as by us claimed; and, *secondly*, if the equal protection of that law was denied us.

The law of Georgia as to prescription under color of title, as the same has been of force since January 1, 1863, is be found in the following sections of the Code of Georgia of 1882:

§ 2679. Possession to be the foundation of a prescription must be in the right of the possessor and not of another; must not have originated in fraud; must be public, continuous, exclusive, uninterrupted and peaceable, and accompanied by a claim of right. Permissive possession cannot be the foundation of a prescription, until an adverse claim and actual notice to the other party.

§ 2683. Adverse possession of lands, under written evidence of title, for seven years shall give a good title by prescription against every one except the State, or persons laboring under the disabilities hereinafter specified. But if such written title be forged or fraudulent, and notice therefore be brought home to the claimant before, or at the time of the commencement of his possession, no prescription can be based thereon.

"Written evidence of title" and "written title" are here used as synonymous with "color of title," and the Courts of Georgia have uniformly held that a void deed may be relied on as color of title.

In Conyers vs. Kenans et al., 4 Ga., 308, a deed attested

by but one witness (the law of Georgia requiring two—Code 2690) was admitted as color of title, which was assigned as error, plaintiff in error contending specifically that "No deed which is void, can give color of title"—id. 313; but held, that "A defective conveyance, or deed with one witness, or a transfer on the back of a deed, or a bond for titles, is sufficient to give color of title"—id. 308.

In Beverly et al. vs. Burke, 9 Ga. 440, a deed from the Sheriff of Campbell county for land lying partly in that county and partly in Fayette was offered, and "The Court admitted the deed to be void as to that part of the land in Fayette county, but admitted it in evidence, as color of title"—id. 441, which ruling was assigned as error, but upheld, the Court saying: "What is meant by color of title? It may be defined to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used—a title that is imperfect, but not so obviously so, that it would be apparent to one not skilled in the law"—id. 443-44.

On a second hearing of the same case—14 Ga. 70, the sheriff's deed was again admitted as color of title, and again the Court upheld the ruling, saying: "An instrument such as this is alleged to be, is admitted, though defective, in aid of possession, because it is looked to as a sort of definition of the limit and extent of the claim by possession. Such purpose it serves, though not perfect title; but only a sign, semblance, or color of title"—id. 72.

In Ingram vs. Little, 14 Ga. 173, a deed, as executed, was in blank as to names of grantee and amount of consideration, which blanks were subsequently filled in by one having no authority so to do. Held: "Although inadmissible to support title, we hold, as the presiding Judge held, that it is admissible as color of title"—id. 184.

In Lessees of Gittens vs. Lowry, 15 Ga. 336, held: "A deed may be good to convey color of title, although not good to convey title." The Court cites and approves the definition of color of title given in Beverly et al. vs. Burke, 9 Ga. 443, *ut*

sup., and says: "This deed, though not the deed of one having title, and, therefore, not a sufficient deed to convey title, was sufficient to convey a color of title"—id. 338.

In Burkhalter vs. Edwards, 16 Ga. 593, the presiding Judge held that a sheriff's deed, unaccompanied by fi. fa., could not be relied on as color of title, which ruling the Court reversed, saying: "Ought the Sheriff's deed to the land, unaccompanied by the execution under which the sale was effected, have been received as color of title? We think so, most clearly. Conceding that the Sheriff sold without authority, and this is the most that can be presumed from the absence of the fi. fa., his conveyance was void; still, if the purchaser took and held possession under the deed, it was good as color of title"—id. 596.

In Griffin vs Stamper, 17 Ga. 108, the Court (in holding a void bond good color) said: "Whenever the doctrine is advanced that a void deed is good to give color of title, under the statute of limitation, I have perceived, or thought I did, something like a withholding of assent on the minds of some. I confess myself surprised at this"—id. 110, citing Gregg vs. Sayer, 8 Pet. 244, as fully sustaining the rule.

In Hester vs. Coats, 22 Ga. 56, the presiding Judge ruled out a sheriff's deed, unaccompanied by fi. fa., "as legal title, but allowed it to go to the jury as color of title;" and again the Court affirmed the ruling—id. 58.

In Sutton vs. McLeod, 26 Ga. 638, held: "A sheriff's deed is admissible as color of title, even in the absence of the fi. fa", the Court saying: "All this is well settled"—643.

In Hester vs. Coats, 32 Ga. 448, again held that "A sheriff's deed is admissible in evidence as color of title, without the execution under which the property was sold, and without any evidence accounting for its absence."

In Field vs. Boynton, 33 Ga. 242, the Court said: "Color of title is anything in writing connected with the title which serves to define the extent of the claim, Watts vs. Smith, 19 Ga. 12; Beverly vs. Burke, 9 Ga. 444; S. C. 14 Ga., 12. It is wholly immaterial how imperfect or defective the writing may be, considered as a deed, if it is in writing, and defines the extent of the claim, it is a sign, semblance, or color of title."

In Wright vs. Smith, 43 Ga. 291, a junior deed, the senior being of record at the time of making thereof, was upheld as color of title.

In Garrett vs. Adrian, 44 Ga. 276; Fry vs. Shehee, 55 Ga. 212; and again, in Hunt vs. Pond, 67 Ga. 578, the same principle was announced.

In Payne vs. Blackshear, 52 Ga. 637, R. made a deed in his own name to D., the latter knowing at the time the title was not in R., but in B., for whom R. assumed to act. Held, that the deed was good color.

In Brady vs. Walters, 55 Ga. 25, a deed made under a private sale, when by law it should have been public, was held color of title.

In Bennett vs. Walker, 64 Ga. 326, ruled: "The deed of the Ordinary does not pass title out of the county, he having no legal power to make it, but only to authorize it to be made by some one or more other persons as a commission. Such deed, however, if free from fraud, will be color of title on which to base a prescription."

In Hammon & Hinson vs. Crosby & Co., 68 Ga. 767, the Court re-affirmed the rule as laid down in 9 Ga. 440, 16 Ga. 593, 22 Ga. 56, and 32 Ga. 448., *ut sup*, that a sheriff's deed unaccompanied by fi. fia., is color of title.

In Burdell vs. Blain, 66 Ga. 169, held: "Color of title is anything in writing which serves to define the extent and character of the claim to the land, with parties from whom it may come and to whom it may be made. A paper of this character is admissible as color of title on which to base a prescription."

In Veal vs. Robinson, 70 Ga. 809, held: "Color of title is anything in writing purporting to convey title to the land, which defines the extent of the claim, it being immaterial how defective or imperfect the writing may be, so that it is a sign, semblance, or color of title."

Other authorities to like effect might be cited, but enough has been said to show that, under the laws of Georgia, a void deed is color of title on which prescription may be based. The nature or occasion of the invalidity of the deed is immaterial.

In Bazemore vs. Davis, 69 Ga. 745, held: "The prescription will ripen if founded in the proper facts upon an estate as large as the deed expresses, without reference to the source from which it purports to derive title."

The general doctrine of Georgia on the subject of color of title is, therefore, substantially, if not substantially the same as that recognized by this Court.

In Hall vs. Law, 102 U. S. 461 (3), held: "An instrument gives color of title, whether the grantor act under authority of judicial proceedings, or otherwise, if by apt words of transfer it passes what purports to be the title."

In Leffingwell vs. Warren, 2 Bl. 599 (6), held: "It is immaterial whether the sale and deed be void or valid—it is sufficient that a sale has been made and the deed recorded, to bring the statute into activity, and, after the lapse of the time limited to entitle the purchaser and those claiming under him to its protection."

In Wright vs. Mattison, 18 H. 56, said: "The Courts have concurred, it is believed, without an exception, in defining color of title to be that which in appearance is title but which in reality is not. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title."

We submit, therefore, that the law of Georgia on the subject of prescription is as by us stated, namely that a void deed is color of title on which prescription may be based.

Now, in holding "this void deed," i. e. a deed invalid as having been made in contravention of the statute of 1818, could not be relied on as color of title, did the Court below deny us the equal protection of the general law of prescription? Were we entitled to rely on this kind of void deed, as other people rely on other kinds of void deeds, and did the Court by enforcing the Act of 1818 deny us that right?

We have seen that the Supreme Court of Georgia has repeatedly held other deeds, void as having been made in contravention

of other statutes, good as color of title. A deed attested by but one witness, when the law requires two—Conyers vs. Keenans, 4 Ga. 308; or, by a sheriff to land in a foreign county, when the law confines him to his own bailiwick—Beverly vs. Burke, 9 Ga. 440, S. C. 14 Ga. 70; or, by a grantor out of whom title has passed by a prior recorded deed, though the law makes such second feoffment indictable—Wright vs. Smith, 43 Ga. 291; Garnett vs. Adrian, 44 Ga. 276; Fry vs. Shehee, 55 Ga. 212; Hunt vs. Pond, 67 Ga. 578; a deed made under a private sale, when the law requires a public—Brady vs Walters, 55 Ga. 25; a deed by the ordinary to county land, he being prohibited by law from making it—Bennett vs. Walker, 64 Ga. 326—have each and all been upheld as color of title; and the peculiarity of all these cases is that the law which made these deeds void as title was of full force and effect when the deeds were held good as color of title.

Why then hold this particular deed, void as made in contravention of this particular statute, unavailable as color of title; especially when at the time it was set up as color the act which made it void as title was no longer in force, but had been repealed?

In affirming the judgment of the trial Court that "this void deed" could not be set up as color of title, the Supreme Court of Georgia seems to rely upon two cases (Trans. 120) namely Swoll vs. Oliver, 61 Ga. 248, and Planters Loan and Savings Bank vs. Johnson, 70 Ga. 302.

In Swoll vs. Oliver, 61 Ga. 248, it appeared that in 1842 one Cally entered into a parol trust to hold certain lands in Savannah for one Aspasia Mirault, a free person of color, and her heirs; so that in this case, there is no question of color of title; i. e. something in writing indicative of an estate in Aspasia.

In Planters Loan and Savings Bank vs. Johnson, 70 Ga. 302, one Johnson, a free man of color, bought land in Augusta in 1858 or 1859, and paid certain instalments of the purchase money in 1862 and 1865, for which he received receipts. In February, 1866, before the Statute of 1818 was repealed, he

died, intestate. In October, 1866, the vendor made a deed to his widow, and the contest was between his children, who relied on the receipts as color of title, and an innocent purchaser, who bought from the widow without notice of the children's claim. The case turned mainly on the doctrine of innocent purchaser; but upon the other point the Court ruled that, by reason of the Act of 1818, Peter passed neither title, nor color of title to his heirs. Upon the analogy of the disability of color to the disability of alienage, the case was perhaps well ruled; for, while an alien may take by grant or devise, he cannot take by descent —Dawson vs. Godfrey, 4 Cr. 321 : Co. Litt. 2 b.—and Peter dying intestate before the repeal of the Act of 1818, it might well be that his heirs took nothing.

But, taking it that the case in 70 Ga. 302 is a direct adjudication that a deed, void as having been made in contravention of the Act of 1818, cannot be relied on in Georgia as color of title, we respectfully submit that such an adjudication is directly in the teeth of the constitutional provisions on which we rely.

If, in the case at bar, the equality of right guaranteed by those provisions, has been denied us, that denial cannot be justified by a previous like denial.

"A State may act through different agencies, either by its legislative, its executive, or its judicial authorities, and the prohibition of the amendment extends to all action of the State denying equal protection of the laws"—Virginia vs. Rives, 100 U. S. 318.

"It nullifies and makes void all State legislation and State action of every kind which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property, without due process of law, or which denies them the equal protection of the laws"—Civil Rights Cases, 109 U. S. 11.

Nor will it do to say that the law is equal, since it would be enforced against any one setting up such a deed as the one of 1854 as color of title, whether white or black. No white man could set up such a deed as color, unless he were a colored man's

grantee—or a colored man, himself, *quoad hoc;* and the root of the matter would still be the legal inferiority of the colored race.

With a word as to the evidence, so far as relevant to the issues here involved, we submit the case.

Complainant avers in her bill (Trans. 11) that neither Robertson, the nominated trustee, nor any other accepted or acted in the trust. At the trial no testimony whatever was offered to support this allegation. To the contrary, it appeared by the deed as introduced in evidence (Trans. 65, 17–18, 67–69) that it was attested, and delivered and recorded contemporaneously with its execution, circumstances quite sufficient to demonstrate its delivery in the absence of all opposing testimony—Young vs. Guilbeau, 3 Wall. 636; Ross vs. Campbell, 73 Ga. 315; Fletcher vs. Horne, 75 Ga. 134. Moreover, it appears that, in 1856, one Barber was appointed guardian of complainant and respondent Frances on their petition therefor (Trans. 66, 71), the State law then requiring free persons of color to have a guardian, who had charge of their person and estate—Cobb's Dig. 985; and in 1861, 1864, and 1865, returned the land in controversy for taxation for them (Trans. 57, 65, 70). Still further, it appeared that in an ante-bellum map of Augusta made subsequent to the execution of the deed of 1854 the City Surveyor had written on this lot the names of Robertson and Barber, as if to indicate their ownership or control thereof (Trans. 60-62).

So far, therefore as the evidence goes, it intimates pretty clearly that first Robertson and then Barber acted in this trust; but, however that may be, all sides admit the execution of the deed (Trans. 11, 21), and a trust shall never fail for want of a trustee —Story Eq. Jur. 1060–1; Code, Ga., 3195.

Wherefore we pray that the judgment of the Honorable the Supreme Court of Georgia be reversed; and pray further that, under section 709 of the Revised Statutes of the United States, said Court be instructed to direct the Superior Court of Richmond County to enter a decree in this cause that said deed of 1854 creates a valid subsisting trust in the property in question

to the sole use of plaintiff in error Frances Beatty for her life, remainder to her co-plaintiffs in error, as next of kin of Thomas Gardner, if in life at the termination of said life estate, and if not then in life, then to such as may then answer the description of such next of kin.

The value of the property is small (Trans. 57); the burden of a litigation begun in 1879 is already great; complainant is dead, pending the cause (Trans. 76–81): the case turns wholly on law; and the interests of justice seem to require this direction if a reversal be ordered.

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